

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 197

NORFOLK AND WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

W. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF
WEST VIRGINIA, ET AL.

IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE
OF WEST VIRGINIA.

FILED JUNE 14, 1915.

(23,751)

(23,751)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 600.

NORFOLK AND WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

W. G. CONLEY, ATTORNEY GENERAL OF THE STATE OF
WEST VIRGINIA, ET AL.

IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE
OF WEST VIRGINIA.

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RECORD.

In Chancery. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,

vs.

W. G. CONLEY, Attorney General of the State of West Virginia; George D. Moore, Prosecuting Attorney of the County of Jefferson; D. B. Hardwick, Prosecuting Attorney of the County of Wayne; S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo; Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer.

(Pleas before the Judge of the Circuit Court for the County of Kanawha, held at the Court House thereof, on the 15th day of March, 1913.

Be it remembered, that heretofore, to-wit: On the 14th day of August 1909, came the plaintiff, by its attorneys, and sued out of the Circuit Court Clerk's Office of Kanawha County, West Virginia, a summons in chancery, which summons with the return of the Sheriff endorsed thereon is in the words and figures following, to-wit:)

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Summons in Chancery.

The State of West Virginia to the Sheriff of Kanawha County, Greeting:

We command you that you summon W. G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwick, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, if they be found within your bailiwick, to appear before the Judge of our Circuit Court for the County of Kanawha, at rules to be held in the Clerk's Office of said Court on the first Monday in September next to answer a bill in Chancery, exhibited against them in our said court, by Norfolk & Western Railway Company, a corporation, and have then there this writ.

Witness: Ira H. Mottesheard, Clerk of our said Court, at the Court House of said County, the 14th day of August 1909, and in the 47th year of the State.

IRA H. MOTTESHEARD, *Clerk.*

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NORFOLK & WESTERN RAILWAY COMPANY VS.

3

(Returns.)

Executed the within process on the within named Will G. Conley, Att'y General on the 24th day of Aug. 1909, by delivering to him in person, an office copy thereof.

S. P. SMITH, S. K. C.,
By S. C. HARLESS, D. S.

Executed the within writ on the 1st day of September 1909 by delivering a true copy thereof to Geo. D. Moore, Prosecuting Attorney of Jefferson County West Va. in person.

C. D. WYSONG, Sheriff,
By S. C. YOUNG, D. S.

Executed the within summons on D. B. Hardwick in Wayne Co. W. Va. this Aug. 19/09.

SAM J. CRIM, S. W. C.

Executed the within summons on the within named S. U. G. Rhodes, Prosecuting Attorney of Mingo County by delivering to him a true copy in Mingo County, W. Va. on the 28th day of Aug. 1909.

W. A. HURST,
Sheriff Mingo County.

4

Served the within Summons on the within named John R. Pendleton on the 20 day of Aug. 1909, in Mercer County, W. Va., by delivering to him in person a true office copy thereof.

I. J. ELLISON, S. M. C.

(And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 23rd day of August 1909.)

In Chancery. No. 2207.

NORFOLK AND WESTERN RAILWAY COMPANY

vs.

WILLIAM G. CONLEY, Attorney General, et al.

This day this cause came on to be heard upon the plaintiff's bill, and thereupon the defendant, William G. Conley, Attorney General of the State of West Virginia, made a special appearance to said bill, and tendered and filed his special written motion to dismiss the said bill for the reasons set out in said motion, which motion, after argument by counsel both for the plaintiff and the defendants, is overruled by the Court, and thereupon, without waiving said motion, the said defendant tendered his demurrer in writing to said bill, which is filed and set down for argument, and the said demurrer, being argued by counsel, is overruled, and the Court having

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maturely considered its allegations and being of the opinion therefrom that the Act of the Legislature of the State of West Virginia passed on the 20th day of February, 1907, approved by

the Governor February 24th, 1907, and taking effect ninety days from its passage, being Chapter 41 of the Acts of 1907, entitled "An act relating to and regulating passenger rates upon railroads in the State of West Virginia and prescribing penalties for the violation thereof," is unconstitutional and void, and that the plaintiff, the Norfolk and Western Railway Company, is entitled to an injunction against the defendants, William G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwicke, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, as such attorneys and officers, enjoining them, and each of them, from enforcing said Act as prayed for in the plaintiff's bill of complaint: It is therefore adjudged, ordered and decreed that the defendants, William G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwicke, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton,

6 Prosecuting Attorney of the County of Mercer, and all other persons and individuals whomsoever, be, and they and each of them are hereby enjoined, restrained and prohibited from instituting, or bringing, or causing to be instituted or brought, any action, suit, prosecution, or other proceeding, against the plaintiff, the Norfolk and Western Railway Company, or any of its officers, agents, or employes, to recover any fine, penalty, or damages, occurring or accruing under, or imposed by the said Act of the State of West Virginia, approved February 24th, 1907, hereinbefore referred to, and limiting the charge for the transportation of passengers, with ordinary baggage not exceeding one hundred pounds in weight, to the maximum sum of two cents per mile, or fractional part of a mile; and from instituting, or causing to be instituted any proceeding for mandamus, injunction, prohibition, or other proceeding, against the plaintiff, the Norfolk and Western Railway Company, or any officer, agent or employe of said plaintiff, to compel it to put into effect or observe said statute; also restraining and enjoining all other individuals, persons or corporations, now or hereafter claiming any right under or by virtue of said statute, from instituting, bringing or prosecuting any suit or suits against the plaintiff for the recovery of damages, or for any other cause of action, for the

7 plaintiff's failure to observe the requirements of said statute; and said defendants as aforesaid, and each of them, and any and all other persons, are also enjoined, restrained and inhibited from procuring, or attempting to procure, any indictment or indictments against the plaintiff, and from instituting criminal proceedings or prosecutions against it of any character because of its failure to observe and carry out the said two cent law, or because of any violation of said law by the plaintiff.

But it is further ordered that in the event the plaintiff shall put into

effect upon its line or lines any rate or rates for the transportation of intrastate passengers within the State of West Virginia, exceeding the rate named in the said Act of February 20th, 1907, entitled "An Act relating to and regulating rates upon railroads in the State of West Virginia and prescribing penalties for the violation thereof," the said plaintiff shall give to any person who travels between points on its line in the State of West Virginia at a rate exceeding two cents per mile a coupon or coupons, substantially in the words and figures following, to-wit:

"The Norfolk and Western Railway Company.
West Virginia Ticket Claim Coupon.
When Stamped by Issuing Agent.
To be Retained by Passenger.
Not Good for Passage.

Issued under the order of the Circuit Court of the County of Kanawha, in a suit in equity therein pending between the
8 Norfolk and Western Railway Company and W. G. Conley, Attorney General of the State of West Virginia, and others."

And that said coupon shall be of such form and number as that from it, in connection with the ticket or other evidence of transportation to which it corresponds, may be ascertained the sum to which such person shall be entitled in the event this order of this Court be set aside, vacated and reversed.

And it is further ordered that the plaintiff herein shall, until the further order of this Court, preserve and produce whenever so ordered by this Court all cancelled tickets or other evidence of transportation in respect of which coupons, as hereinbefore provided, may be outstanding, and shall, from time to time, as may be required by order of this Court so to do, report to the Court statements showing the revenue by it charged and collected for the intrastate transportation of passengers in the State of West Virginia in excess of the amount permitted by said Act of February 20th, 1907, as above referred to.

It is further ordered that a certified copy of this order from the records of this Court may be served upon the defendants, and each of them, with the same effect as if a formal writ of injunction had been issued pursuant to this order and served.

(The Bill of Complaint referred to in the foregoing order is in the words and figures following, to-wit:)

9 In the Circuit Court of Kanawha County, West Virginia.

NORFOLK AND WESTERN RAILWAY COMPANY, a Corporation,
Plaintiff,

VS.

W. G. CONLEY, Attorney General of the State of West Virginia,
et al., Defendants.

The bill of complaint of the Norfolk and Western Railway Company, a corporation, against W. G. Conley, Attorney General of the

State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwicke, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, defendants, filed in the Circuit Court of Kanawha County, West Virginia, being the County wherein the seat of Government of said State is:

The plaintiff complains and says:

1. That it has for some years last past owned and operated, and now owns and operates, a system of railroads in the States of Virginia, West Virginia, North Carolina, Kentucky, Ohio and Maryland, aggregating in main line and branches as of June 30, 1908, a total mileage of 1919.50 miles; that of this total mileage 240.76 of main line is located in the State of West Virginia, and 203.94 miles of branch lines therein, which mileage, both main and branch, is distributed among the following counties in said State as follows:

County.	Main line.	Branches.	Total.
Jefferson	18.46	.89	19.35
Wayne	58.23	62.89	121.12
Mingo	77.60	17.44	95.04
McDowell	54.36	79.25	133.61
Mercer	32.11	43.47	75.58
Total	240.76	203.94	444.70

2. That at the date of the passage of the Act hereinafter complained of, that is to say, on the 20th day of February, 1907, as well as at the time when the same went into effect, that is to say, on the 21st day of May, 1907, the property of this plaintiff in the State of West Virginia was valued and assessed for taxation by the Board of

Public Works of said State at \$31,000,051.45, and at the time of the passage of said Act and for a long time prior thereto this plaintiff charged for the transportation of persons within the State of West Virginia a rate per mile not to exceed that prescribed by Sections 2472 and 2473 of the Code of West Virginia of 1906, which passenger rate so charged by it was reasonable, just and lawful, and approximated a rate per mile of 2.94 cents and enabled the plaintiff to earn gross during the fiscal year ending June 30, 1907, from the transportation of intra-state passengers within the State of West Virginia, the sum of \$362,997.74; that the total gross earnings of the plaintiff from all sources within said State during the same period, including the earnings from the transportation of passengers within the State as aforesaid, were \$8,090,082.56; and that the total capital of the plaintiff as valued and assessed, apporportioned on the basis of the gross earnings as aforesaid between the earnings from the transportation of intra-state passengers within the State and the earnings from all sources within the State would show the investment of the plaintiff within the State for the fiscal year

ending June 30, 1907, and properly to be allotted to the transportation of intrastate passengers therein to have been \$1,391,902.31.

The plaintiff further avers that during the year aforesaid it managed its said railroad honestly and economically and that by said management it reasonably cost the plaintiff to earn the said

12 sum of \$362,997.74 from transporting passengers within the State approximately 85 cents to earn each dollar thereof; and that in consequence the return to it during said year from its capital embarked as aforesaid in the business of transporting intrastate passengers in West Virginia during said year was at the rate of 3-7/10 per cent per annum.

3. That the Legislature of the State of West Virginia, by an Act entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the violation thereof", passed February 20, 1907, approved by the Governor February 24, 1907, and to take effect ninety days from its passage; that is to say, on the twenty-first day of May, 1907, which said Act is Chapter 41 of the Acts of the Legislature of West Virginia, regular and extra sessions for the year 1907, and to which reference is here made, sought to limit the passenger fares of this plaintiff to two cents per mile by providing, among other things, "that all railroad corporations organized or doing business in this State under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile or fractional part of a mile", and by further providing that "any railroad company which shall charge, demand or receive

13 any greater compensation for the transportation of any passenger than is authorized by this Act shall be fined for each offense not less than fifty dollars nor more than five hundred dollars; provided that nothing contained in this Act shall apply to electric lines and street railways owned or operated in this State".

4. That this plaintiff has not at any time, and does not now operate within said State an electric line, or any such railway as is excepted from the provisions of the Act Aforesaid contained in Chapter 41 of the Acts of the Legislature of West Virginia, for 1907, but a steam railway of more than fifty miles in length, and that it has been before and since the passage of said Act, and is now, doing business in said State under the laws and authority thereof.

5. That immediately upon and going into effect of the Act aforesaid,—that is to say, upon the 21st day of May 1907,—this plaintiff put into effect on its line within the State of West Virginia the rates provided by said Act and has since kept the same in effect and has complied and is complying with said Act in not charging more than two cents per mile or fraction of a mile for carrying intra-state passengers over its line within the State of West Virginia; and it further says that the effect of said Act of 1907 has been as follows:

That during the fiscal year immediately following the date when said Act went into effect,—that is to say, from the 1st day of

14 July, 1907, to the 1st day of July, 1908,—the gross earnings derived from the transportation of intrastate passengers

within the State of West Virginia amounted to \$289,943.22, and the necessary expense incident to the earning of said \$289,943.22 was approximately 95 per cent thereof, or, in other words, it cost about 95 cents to earn each dollar of said amount, and, treating the capital invested within the State and devoted to the transportation of intra-state passengers therein as being the same for the year 1908 that it was for the year 1907, the net earnings for the fiscal year ending June 30th, 1908, derived from the transportation of intra-state passengers within the State approximated 1.04 per cent per annum on the plaintiff's capital invested in said State and allotted to the transportation of intra-state passengers therein.

And the plaintiff says that the actual capital of the plaintiff in the State of West Virginia during the fiscal year ending June 30th, 1908, and devoted to the transportation of intra-state passengers therein was not less than the capital invested therein during the year ending June 30th, 1907.

That during the fiscal year ending June 30th, 1909, the gross earnings derived from the transportation of intra-state passengers

15 within the State of West Virginia amounted to \$277,557.05 (nine months of said fiscal year is actual and the remaining three months is estimated) and the necessary expense incident to the earning of said \$277,557.05 was approximately 98.19 per cent thereof, or, in other words, it cost about 98.19 cents to earn each dollar of said amount, and, treating the capital invested within the State and devoted to the transportation of intra-state passengers therein as being the same for the year 1909, that it was for the year 1907, the net earnings for the fiscal year ending June 30th, 1909, derived from the transportation of intra-state passengers within the State approximated .38 of 1 per cent per annum on the plaintiff's capital invested in said State and allotted to the transportation of intra-state passengers therein.

And the plaintiff says that the actual capital of the plaintiff in the State of West Virginia during the fiscal year ending June 30th, 1909, and devoted to the transportation of intra-state passengers therein was not less than the capital invested therein during the year ending June 30th, 1907.

That the effect, therefore, of the said Act has been, and is, to reduce the rates and revenues of the plaintiff, and decrease its earnings from intra-state passenger business in the State of West Virginia

16 below what would be a reasonable compensation for the services rendered, and has been, and is, operating a confiscation of its property, in violation of the law of the land, in that it has deprived, and is depriving, the plaintiff of the rights, privileges and immunities guaranteed to it by the Constitution of the State of West Virginia contained in the following provisions of said instrument, viz:

(1) Section 9 of Article III of the Constitution of West Virginia, which provides that "Private property shall not be taken or damaged for public use without just compensation".

(2) Section 10 of Article III of the Constitution of West Virginia, which provides that "No person shall be deprived of life, lib-

erty or property without due process of law and the judgment of his peers."

And the plaintiff claims the benefit and protection of the said provisions of the Constitution of the State of West Virginia.

6. The plaintiff further says that, by Section 2 of the said Act of 1907, it is provided that any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by the said Act shall be fined for each offense not less than fifty dollars nor more than five hundred dollars, and the plaintiff is advised that the effect of said Act is to subject it to a maximum fine of five hundred dollars for each sale of an intra-state passenger ticket in West Virginia at a rate

17 exceeding two cents per mile, or for each act of any conductor in collecting from any passenger more than two cents per mile, or any act of its employees in disobedience of said Act; and the plaintiff says that, in the operation of its lines of railway in West Virginia, it receives and carries many hundreds of passengers every day, and that, by these enormous penalties, an attempt is made to prevent the plaintiff from securing any judicial inquiry into the validity of the Act, and that its penal provisions were enacted for the purpose of so burdening any challenge of the Act in the courts that the plaintiff and others affected thereby would be compelled to submit, as has been the case, to the confiscation worked by said Act; and the plaintiff is advised that the effect of these penalties is to deprive it of the equal protection of the law, and is a denial to the plaintiff of due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"; and this plaintiff claims the benefit and protection of the said provision of the Constitution of the United States and the laws passed in pursuance thereof.

18 7. The plaintiff further alleges that it is advised and therefore avers, that the said Act of the Legislature of the State of West Virginia, being Chapter 41 of the Acts of West Virginia of 1907, is also void as arbitrarily and artificially classifying railroads, such as this plaintiff, fifty miles in length and over in one class, and subjecting the same to the burdens and penalties of the Act, while exempting from such burdens and penalties all railroads under fifty miles in length; and this plaintiff avers and charges that this classification is in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as unreasonable, unjust and discriminating class legislation, which, as this plaintiff avers, appears upon the face of the Act itself.

8. The plaintiff further says that, unless this Honorable Court takes jurisdiction of and determines the question of the constitutionality of said Act of the Legislature of the State of West Virginia of 1907, and affords the plaintiff relief in respect thereto in this cause,

the work of confiscating its property through said Act, as hereinbefore set out, will either go on, or the number of actions or penalties to which this plaintiff will be exposed will be enormous, and the defense thereof difficult, if not impossible, and, in any event, the said actions and penalties will be seriously and unjustly burdensome and expensive to this plaintiff, and will subject it to a multiplicity of indictments and suits and prosecutions for penalties, to its irreparable damage.

19 9. The plaintiff further shows that its purpose in this cause is, by an orderly proceeding in this court, to obtain a judicial determination of its rights under the Constitution of the State of West Virginia and under the Constitution and laws of the United States, and, if, as it is advised and believes, its just rights in the premises are imperiled, denied and encroached upon by the statute hereinbefore set forth, to obtain a judicial decree establishing and protecting its rights in the premises.

10. The plaintiff finally says that the defendant W. G. Conley is the Attorney General of the State of West Virginia, that the defendant George D. Moore is the Prosecuting Attorney of the County of Jefferson, the defendant D. B. Hardwicke is the Prosecuting Attorney of the County of Wayne, the defendant S. U. G. Rhodes is the Prosecuting Attorney of the County of Mingo, the defendant Robert R. Smith is the Prosecuting Attorney of the County of McDowell, and the defendant John R. Pendleton is the Prosecuting Attorney of the County of Mercer; all of which said Counties are located in and constitute political divisions of the said State of West Virginia, and that, under the Constitution and laws of said State, said defendants, (the Attorney General in The Supreme Court of

20 Appeals of the State, and said Prosecuting Attorneys each in his own County), are charged with the institution and conduct of all prosecutions such as are provided for in the Act of 1907 hereinbefore complained of, and that this plaintiff is informed and believes that said defendants, and each of them, within their respective spheres, intend to, and will, enforce the provisions of the said Act of 1907, against this plaintiff, unless they, and each of them be enjoined from so doing by this Honorable Court.

The plaintiff, therefore, prays that a writ of injunction may be issued out of this Court, restraining, enjoining and inhibiting the said defendants, and each of them, and all other individuals and persons whomsoever from instituting or bringing, or causing to be instituted or brought, any action, suit, prosecution or other proceeding against this plaintiff, or any of its officers, agents or employees, to recover any fine, penalty or damages occurring or accruing under or imposed by the said Act of the West Virginia Legislature approved February 24, 1907, hereinbefore referred to, limiting the charge for the transportation of passengers with ordinary baggage, not exceeding one hundred pounds in weight, to the maximum sum of two cents per mile or fractional part of a mile, or from instituting, or causing to be instituted, any proceeding for mandamus, injunction, prohibition or other proceeding against this plaintiff, or any of its officers, agents or employees, to compel the

21 plaintiff to put into effect or observe said statute; also restraining and enjoining all other individuals, persons or corporations, now or hereafter claiming any right under or by virtue of said statute, from instituting, bringing or prosecuting any suit or suits against the plaintiff for the recovery of damages, or for any other cause of action for the plaintiff's failure to observe the requirements of said statute; that the said statute may be declared to be null and void and of no effect, so far as it relates to the plaintiff's lines of railroad in the State of West Virginia hereinbefore set forth; that the said defendants as aforesaid, and each of them, may be enjoined, restrained and prohibited from procuring, or attempting to procure, indictments against the plaintiff, and from instituting criminal proceedings or prosecutions against it of any character because of its failure to observe and carry out the said two-cent law, or because of any violation of said law by the plaintiff; and that this plaintiff may have such other, further and general relief in the premises as the nature of its case requires and the Court may see fit to grant.

NORFOLK AND WESTERN RAILWAY
COMPANY,

By L. E. JOHNSON, *President*.

Attest:

[SEAL.]

H. W. GRIFFITH,

Ass't Secretary.

JOS. I. DORAN,
THEODORE W. REATH,
HOLT & DUNCAN,
Counsel.

22 STATE OF VIRGINIA,
City of Roanoke, To wit:

Joseph W. Cox, being duly sworn, says that he is the Comptroller of the Norfolk and Western Railway Company, the plaintiff in the bill of complaint attached hereto against the Attorney General of the State of West Virginia and others; that the facts therein set out are peculiarly within his knowledge as Comptroller of the plaintiff company; that all the facts stated in said bill and allegations therein contained are true, as he verily believes.

JOS. W. COXE.

Taken, subscribed and sworn to before me, the undersigned Notary Public in and for the City of Roanoke, State of Virginia, this 5th day of August, 1909.

[SEAL.]

GEO. N. DICKINSON,

Notary Public.

My commission expires on the 25th day of May 1910.

(Special Appearance and Motion to Dismiss referred to in the foregoing order is in the words and figures following, to-wit:)

23 In the Circuit Court of Kanawha County, West Virginia.

In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,

v.

WM. G. CONLEY, Attorney General, et al.

This day specially appeared the defendant, Wm. G. Conley, Attorney General of the State of West Virginia, for the purpose only of moving, and he does hereby move, to dismiss the bill of complaint in the foregoing styled cause upon the ground that this suit is against the State of West Virginia without her consent and prohibited by the Constitution of said State, and for the further ground that the Circuit Court of Kanawha County does not have jurisdiction of this cause.

WM. G. CONLEY,

Attorney General, State of West Virginia.

(The Demurrer referred to in the foregoing order is in the words and figures following, to-wit:)

24 In the Circuit Court of Kanawha County, West Virginia.

In Chancery.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation,

vs.

WILLIAM G. CONLEY, Attorney General, et al.

The Demurrer of William G. Conley, Attorney General of the State of West Virginia, Defendant, to the Bill of Complaint of the Norfolk & Western Railway Company, Plaintiff.

This defendant, not confessing all or any of the matters or things in the bill of complaint in the above styled cause contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to the bill and each paragraph and part thereof; and for causes of demurrer shows:

First. That the plaintiff's bill filed herein does not state any matter of equity entitling it to the relief prayed for against this demurrant or any of the defendants jointly or severally.

Second. That it appears from the bill that this cause is in truth and in effect a suit against the State of West Virginia without its consent, and therefore in violation of section 35 of article 6 of the Constitution of West Virginia.

25 Third. That the allegations in said bill are not sufficient to give jurisdiction to the circuit court of Kanawha county to hear and determine this cause.

Fourth. That it appears from the bill that this suit is in truth and

in effect a suit to enjoin the institution of criminal proceedings and to enjoin criminal prosecutions.

Fifth. That it also appears from the bill that the plaintiff has a plain, adequate and complete remedy at law; that it appears from the act itself complained of in said bill, that it is not in violation of any constitutional provision of the State of West Virginia or of the United States, nor is it in violation of any federal law regulating interstate commerce.

Sixth. That it appears from the bill that the same is filed and exhibited against the defendants named therein in their official capacity only; and that the relief sought against the defendants, jointly and collectively, is the restraint and control of their discretionary action, and each of them, in their official capacity; and that it further appears from the bill that the defendants named therein have no personal interest whatever in the proceedings.

Seventh. That the bill does not sufficiently set out the facts and figures therein to enable this demurrant or any of the defendants to ascertain from the bill whether or not the operation of said
26 Act of the Legislature, as applied to the complainant, is in violation of the Constitution of the State of West Virginia and the Constitution of the United States, as alleged by it.

Wherefore, for divers other good causes of demurrer appearing upon the face of the bill and in each paragraph and part thereof, this defendant demurs thereto, and prays the judgment of the court whether he shall be compelled to make any further or other answer to the bill, and humbly prays to be hence dismissed with his reasonable costs in this behalf expended, and as in duty bound he will ever pray.

WM. G. CONLEY,
Attorney General, State of West Virginia.

(And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 30th day of July 1910.)

In Chancery. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY
vs.
WILLIAM G. CONLEY, Attorney General, et al.

On this day, July 30, 1910, came the defendants and tendered to be filed their joint and separate answer to the bill of complaint herein, which answer is hereby filed, to which the
27 plaintiff replies generally. And there being some question by counsel whether the restraining order entered herein on the 23d day of August 1909, and of record in Chancery Order Book No. 32, page 164, is a temporary or a final order, therefore, and by the consent of the parties to this suit, the Court doth, adjudge, order and decree that said order was intended and shall be taken and treated as a temporary restraining order, and is subject to modification or to

be set aside in whole or in part by this Court. And thereupon the defendants moved the Court to dissolve said preliminary writ of injunction heretofore awarded herein and to redeem and pay for the coupons issued thereunder, but the plaintiff desiring to take testimony in support of its bill, the hearing of said motion is continued until the next regular term of this Court.

28 (The Joint and Separate Answer to the Bill of Complaint referred to in the foregoing order is in the words and figures following, to-wit:)

In Equity.

NORFOLK & WESTERN RAILWAY COMPANY

v.

WILLIAM G. CONLEY, *Attorney General, et al.*

The Joint and Separate Answer of William G. Conley, Attorney General of the State of West Virginia; George D. Moore, Prosecuting Attorney of the County of Jefferson; D. B. Hardwicke, Prosecuting Attorney of the County of Wayne; S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo; Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, all in said State of West Virginia, to the Bill of Complaint of the Norfolk & Western Railway Company, a Corporation, Filed Against Them in the Circuit Court of Kanawha County, said State.

To the Honorable Samuel C. Burdett Judge of said Circuit Court:

These respondents, reserving to themselves all right of exceptions to said bill of complaint, for answer thereto, or so much thereof as they are advised it is material for them to answer, jointly and severally answer and say:

I.

That these respondents believe it to be true, that the plaintiff for some years last past has owned and operated, and now owns and operates, a system of railroads in the States of Virginia, West
29 Virginia, North Carolina, Kentucky, Ohio and Maryland, aggregating in main line and branches as of June 30, 1908 a total of 1919.59 miles; and these respondents are informed, believe and aver that the miles of main track and branches, not including second main tract nor sidings, operated by the plaintiff for the years ending June 30, 1907, June 30, 1908, and June 30, 1909, with the percentage of said mileage in West Virginia compared with the total mileage in all states, was as follows:

	1907.	1908.	1909.
All States.....	1862.71	1919.59	1941.58
West Virginia.....	432.65	444.69	453.25
Percentage in West Va.....	23.23%	23.16%	23.34%

II.

That it is true, as alleged in paragraph two of the plaintiff's bill, that at the time the Act complained of (known as the Two Cent Passenger Act) was passed on the 20th day of February, 1907, and at the time said Act took effect on the 21st day of May, 1907, the property of the plaintiff located in the State of West Virginia was valued and assessed by the Board of Public Works of West Virginia at the sum of \$31,000,051.45; and these respondents aver, that an officer of the plaintiff company, acting under a duty imposed upon him by law, made, under oath, a detailed statement to said Board of Public Works of the true and actual value of all the property of the plaintiff in the State of West Virginia, and fixed said value at \$24,749,797.00, and which affidavit was in words and figures following, to-wit:

30

"Oath.

STATE OF VIRGINIA,

City of Roanoke, ss:

I, the undersigned, Joseph W. Cox, Comptroller of the Norfolk & Western Railway Company, on my oath say that the return as shown on the foregoing sheets, being Nos. 1, 2 and 3, and schedules Nos. 1, 2, 2a, 3 and the several divisions thereof, 4, 5, 6, 7, 7a, 8, 9-1, 9-2, 9-3, 9a, 9-b, 10, 11, 12, and 13 and each sheet thereof, and numbered 1 to — inclusive, has been prepared from the original books, papers and records of said Company; that I have carefully examined the same, and declare the same and each sheet thereof to be a complete and correct statement of the business and affairs of said Company in respect to each and every matter and thing therein set forth, and that all property owned, leased or operated in the State of West Virginia by said Company has been reported, and returned at its True and Actual Value, to the best of my knowledge, information and belief, the words "true and actual value" being understood by me to mean that price for which the beforementioned property would sell if voluntarily offered for sale, upon such terms as such property is usually sold, and not the price which might be realized if said property was sold at a forced sale; and I further say that no deductions were made before stating the gross earnings or receipts herein set forth, except those shown in the foregoing accounts; and that there have been no expenditures for Permanent improvements within the State

31 of West Virginia except as shown on schedule No. 12 of this report; and that there have been no expenditures for Permanent Improvements on the Entire Lines except as shown on schedule No. 12 of this report; and that the accounts and figures contained in the foregoing return embrace all of the financial operations of said Company during the period for which said return is made.

[SEAL.]

JOS. W. COXE,
Comptroller.

Subscribed and sworn to before me this 31st day of March, 1908.

JULIAN H. RUTHERFORD,

Notary Public.

(No tax.)

My Commission expires Dec. 10, 1908."

That it is true, said plaintiff had the legal right to charge the rate prescribed by sections 2472 and 2473 of the Code of West Virginia of 1906, but these respondents deny that said rate charged by the plaintiff was reasonable or just; and they deny that the average rate of fare per passenger per mile during the year ended June 30, 1907, approximated 2.94 cents, and they aver that said rate of fare was only 2.364 cents, as is shown by the sworn report of the plaintiff to said Board of Public Works and also by the annual report of the President of the plaintiff company to the stockholders thereof, to which reference is here made.

That it may be true, as alleged in paragraph two of the plaintiff's bill, that the gross earnings during the fiscal year ended June 30, 1907, from the transportation of intra-state West Virginia passengers was \$362,997.74; and it may be true that the total gross earnings of the plaintiff from all sources within the State of West Virginia during said year while the Three Cent Passenger law in said State was in force aggregated \$8,090,082.56; and it may be true, that the total capital of the plaintiff as valued and assessed in the State of West Virginia, to be allotted to the transportation of intra-state passengers within said state was \$1,391,902.31 if apportioned on the basis of the gross earnings as aforesaid between the earnings from the transportation of intra-state passengers within said State and the earnings from all sources therein; but these respondents deny on information and belief, that this is the proper method to apportion the same; and they deny that it reasonably cost the plaintiff eighty-five cents of each dollar of the said \$362,997.74 it claims to have earned in transporting intra-state passengers within said State to transport the same; and they further deny that the return to the plaintiff on said capital invested in the business of transporting intra-state passengers in West Virginia during said year ended June 30, 1907, was only at the rate of 3.7 per cent. per annum, but aver on the information set out in its reports to said Board of Public Works and to its stockholders for said year that the net return to the plaintiff on its capital invested in West Virginia in its passenger traffic business during said year was largely in excess of six per cent. per annum, after the payment of all taxes and other expenses and the expenditure of large sums for maintenance, equipment and improvements; and these respondents further aver, on information and belief (which information and belief are based upon said reports for said year) that, if the plaintiff honestly and economically managed its said business, the passenger traffic earnings received for business done within the State of West Virginia for said year would be sufficient to pay about 19 per centum per annum on said amount of \$1,391,902.31, and for the years ended June 30, 1908 and June 30, 1909, said earnings would be sufficient to pay slightly less than 19 per centum.

III.

That it is true, as alleged in paragraph three of the plaintiff's bill, that the Legislature of the State of West Virginia, by an Act passed the 20th day of February, 1907, which went into effect the 21st day of May, 1907, and known as chapter 41 of the Acts of the Legislature of West Virginia of 1907, limited the passenger fares of the plaintiff and all other companies owning or operating steam railroads over fifty miles in length within the State of West Virginia to a compensation of not exceeding two cents per mile or fraction thereof to each passenger with ordinary baggage; and it is also true that any railroad company violating said statute, upon conviction therefor, would be liable to a fine of not less than \$50.00 nor more than \$500.00 for each offense.

IV.

That it is true, as alleged in paragraph four of said bill, that the plaintiff does not now operate within the State of West Virginia an electric line, or any such railway as is excepted from the provisions of said chapter 41; and it is true that the plaintiff was then, and is now, doing business as a common carrier within said State.

V.

That these respondents believe it to be true, that the plaintiff, on the 21st day of May, 1907, put into effect on its lines within the State of West Virginia said Two Cent Passenger law, and kept the same in effect until the institution of these proceedings and the granting of the preliminary injunction herein on the 23d day of August, 1909; but these respondents deny that the application of said two cent law has limited the income from the intra-state passenger business within the State of West Virginia to approximately 1.04 per centum per annum on the amount of the plaintiff's capital invested in said State and allotted to the transportation of intra-state passengers therein, as set out in paragraph five of plaintiff's bill.

That it may be true, as alleged in paragraph five of said bill, that the actual capital of the plaintiff in the State of West Virginia during the fiscal year ending June 30, 1908, devoted to the transportation of intra-state passenger- therein was not-less than the capital invested therein during the year ending June 30, 1907, or \$1,391,902.31, but these respondents call for full proof thereof.

That these respondents are informed, believe and so charge, that it is not true, as alleged by the plaintiff, that the gross earnings derived from the transportation of intra-state passengers within the State of West Virginia amounted to only \$289,943.22 for the year ending June 30, 1908, but they aver that the gross earnings derived from said intra-state West Virginia passenger transportation was largely in excess of said amount for said year, and they here call for full and complete proof of its allegation; and they further deny, on information and belief, that the necessary expense incident to the earning of said \$289,943.22 was approximately 95 per centum thereof, but aver that the necessary expense was much less

than said amount, and here call for full proof of its allegation; and they further aver, that a proper and equitable apportionment of the passenger operating expenses incident to earning the sum of \$289,943.22, based upon the sworn report of the plaintiff to the Board of Public Works of said State for the year ended June 30, 1908, will show that net profits arising from the carrying of intra-state West Virginia passengers during said year, after the payment of taxes and all expenses and charges connected therewith, was largely in excess of six (6) per centum per annum on the capital or value of the property used and devoted to that purpose.

These respondents further deny, that the gross earnings derived from the transportation of intra-state passengers within the State of West Virginia for the year ended June 30, 1909, was only \$277,557.05 as alleged by the plaintiff in paragraph five of its bill of complaint, but aver that the amount of such gross earnings for said year, as sworn to by the plaintiff, was \$281,864.50, as is shown on
36 sheet five of its annual return to the Board of Public Works for said year, to which reference is here made; and they further aver, that the total passenger fares for said year, allotted by the plaintiff to the State of West Virginia, as shown by said sheet five of said return, was \$623,804.31, and that the total passenger traffic earnings for said year, as so reported by the plaintiff and allotted to West Virginia, aggregated the sum of \$784,007.79, but these respondents aver, on information and belief, that the total passenger traffic earnings for said year in West Virginia were larger than said sum of \$784,007.79 and that such earnings for said year in said State amounted to nearly \$790,000.00.

These respondents deny, on information and belief, that the necessary expense incident to the earning of said alleged sum of \$277,557.05, was approximately 98.19 per centum thereof; and further deny that the net earnings for the fiscal year ended June 30, 1909, derived from the transportation of intra-state passengers within said State, approximated only 0.38 per centum on the plaintiff's capital invested in said State and allotted by the plaintiff in said bill of complaint to the transportation of intra-state passengers therein; but they aver that the plaintiff company realized in net earnings from its business of the transportation of intra-state West Virginia passengers for said year of 1909 on its property so invested, after the payment of taxes and all expenses and charges properly chargeable to said business, a sum largely in excess of six per centum.

But these respondents deny the legal or equitable right of the plaintiff to segregate the passenger earnings from the other
37 earnings of the plaintiff in determining whether said Two Cent Passenger law operates as a confiscation of its property, and they aver that the entire earnings of the plaintiff from all sources should be considered in connection therewith.

VI.

These respondents admit that said Two Cent Passenger law provides that any company violating said law, upon conviction, shall be

fined not less than fifty dollars nor more than five hundred dollars for each offense, but they deny that the penalty therein provided was made to prevent the plaintiff, or any other corporation, from securing a judicial inquiry into the validity of said law; and they deny that the penal provisions of said law were enacted for the purposes of "burdening any challenge" thereof in the courts; and they further deny that the effects of said penalties upon the plaintiff is to deprive it of the equal protection of the law and of the due process of law; and they deny that it is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, as alleged in paragraph six of the plaintiff's bill of complaint.

VII.

These respondents deny, on information and belief, that said chapter 41 of the Acts of the Legislature of West Virginia of 1907 is void as "arbitrarily and artificially" classifying railroads, as alleged in paragraph seven of the plaintiff's bill of complaint; and they deny that the classification contained in said law is in violation of

38 the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and they deny that said classification contained therein is unreasonable, unjust or discriminating class legislation; but on the contrary, these respondents aver, on information and belief, that said chapter 41 is in all respects valid on its face, and that the classification therein contained is just and reasonable and based upon reasonable differences.

VIII.

These respondents deny the right of the plaintiff to prevent the enforcement of the law complained of, through equity by injunction, enjoining these respondents from performing their official duties thereunder; and they further deny that said law works a confiscation of the plaintiff's property, and deny that the defense of the criminal prosecutions against it for a violation of said law is more difficult to the plaintiff than the prosecution of this suit, and deny that the penalties for such violation would be "unjustly burdensome and expensive;" and they further deny that such prosecutions would work irreparable damage to the plaintiff.

IX.

These respondents deny, on information and belief, that the rights of the plaintiff are in any manner "imperiled, denied and encroached upon" by said law, and again deny the right of the plaintiff to test the constitutionality thereof in these proceedings.

X.

These respondents admit that the defendant, William G. Conley, is the Attorney General of the State of West Virginia; that the defendant, George D. Moore, is the Prosecuting

39

Attorney of Jefferson County; that the defendant, D. R. Hendricks, is the Prosecuting Attorney of Wayne County; that the defendant, S. U. G. Rhodes, is the Prosecuting Attorney of Mingo County; that the defendant, Robert R. Smith, is the Prosecuting Attorney of McDowell County, and the defendant, John R. Pendleton, is the Prosecuting Attorney of Mercer County; and that all of said counties are located within and form a part of the State of West Virginia, and that it would be the official duty of said prosecuting attorneys in their respective counties to institute and prosecute criminal proceedings against the plaintiff and other railroad companies violating the law complained of, and that it would be the official duty of the attorney general to prosecute such proceedings in the Supreme Court of Appeals of West Virginia, if appealed to that Court.

XI.

These respondents still further deny the legal or equitable right of the plaintiff to segregate its passenger business from that of its freight and other business, or to divide any of its earnings from any source or sources, in determining the constitutionality of said Act, and they aver that the entire earnings from all sources should be considered in connection therewith.

These respondents aver, that the gross earnings of the plaintiff from its operations within the State of West Virginia for the year ended June 30, 1907, as reported under oath by the plaintiff to said Board of Public Works were \$8,000,002.56, and that the operating expenses, including taxes for said year, after excluding the value of permanent improvements charged by the plaintiff to operating expenses, were \$5,677,905.17, leaving to the plaintiff net earnings from operations in West Virginia the sum of \$2,412,087.39, which net earnings are more than 9.74 per centum on \$24,749,797.00,—the grand total of the true and actual value of all the plaintiff's property located within the State of West Virginia for said year, as shown by said report, to which reference is here made.

These respondents aver, that the gross earnings of the plaintiff from operations within the State of West Virginia for the year ended June 30, 1908, as reported under oath by the plaintiff to said Board of Public Works, were \$7,429,554.14; and that the operating expenses, including taxes for said year, after excluding the value of permanent improvements charged by the plaintiff to operating expenses, were \$5,361,973.83 leaving to the plaintiff net earnings from operations in West Virginia the sum of \$2,067,580.31, which net earnings are more than 8 per centum on \$25,722,340.00, the grand total of the true and actual value of all the plaintiff's property located within the State of West Virginia for said year, as shown by said report, to which reference is here made.

These respondents still further aver that the gross earnings of the plaintiff from operations within the State of West Virginia for the year ended June 30, 1909, as reported under oath by the plaintiff to said Board of Public Works were

\$7,759,987.98, and that the operating expenses, including taxes for said year, within said State, after excluding the value of permanent improvements charged by the plaintiff to operating expenses, were \$5,189,293.38, leaving to the plaintiff net earnings from operations in West Virginia the sum of \$2,570,694.60, which net earnings are more than 9.3% on \$27,629,865.00,—the grand total of the true and actual value of all of its property located within the State of West Virginia for said year, as shown by said report, to which reference is here made.

These respondents further aver, on information and belief, that the said net earnings of \$2,412,087.39 in West Virginia for the year ended June 30, 1907 is 7.98 per centum on \$31,000,000.00, the value of the plaintiff's property in said State for said year as fixed by said Board of Public Works, and that it is 9.74 per centum on \$24,749,797.00, the grand total of the value of all its property in said State for said year as fixed by the plaintiff in its sworn return to said Board of Public Works; that the said net earnings of \$2,067,570.31 in West Virginia for the year ended June 30, 1908 is 6.26 per centum on \$33,000,000.00, the value of the plaintiff's property in said State for said year as fixed by said Board of Public Works, and that it is 8.04 per centum on \$25,712,786.00, the grand total of the value of all its property in said State for said year as

fixed by the plaintiff in its sworn return to said Board; that
42 the said net earnings of \$2,570,694.60 in West Virginia for the year ended June 30, 1909 is 8.03 per centum on \$32,000,000.00, the value of the plaintiff's property in said State for said year as fixed by said Board of Public Works, and that it is 9.3 per centum on \$27,629,865.00, the grand total of the value of all its property in said State for said year as fixed by the plaintiff in its sworn return to said Board. And these respondents further aver, on information and belief, that said respective sums of net earnings for each of said years is the sum left after deducting from the gross earnings of the plaintiff all taxes and all expenses and all charges for operations, and for maintenance and betterments of its said roadways, tracks and other property, including its rolling stock, (which were the net earnings left after the deduction of an undue amount charged by the plaintiff against that portion of the business in West Virginia) and these respondents aver, that from these net earnings the plaintiff was enabled to pay in each of said years large dividends on the market value of its stock and the interest on all of its debts, and in addition thereto to set aside a large surplus fund.

These respondents still further aver, that any material decrease which may have resulted in both the freight and passenger earnings of the plaintiff during the year ended June 30, 1908, was caused by the general depression in business throughout the country and not because of the enforcement of the Two Cent Passenger law complained of; and they further aver, on information and belief, that both the freight and passenger earnings of the
43 plaintiff very materially increased during the year ended June 30, 1910 over the years ended June 30, 1908 and June

30, 1909, because of the substantial increase in general business conditions.

These respondents still further aver, that each and all of them are citizens and taxpayers of their respective counties and of the State of West Virginia, and as such are a part of the traveling public and frequently travel as passengers on the railroad of the plaintiff, and especially on that part of said railroad located in the State of West Virginia; and that the passenger rate per mile now being charged by the plaintiff for intra-state West Virginia transportation is unfair and unreasonable for the property used in connection therewith and for the services rendered; and they say that said preliminary injunction, issued by this court herein on the 23d day of August, 1909, ought to be dissolved in right and justice to these respondents and to the traveling public generally, and a rate restored not exceeding that provided in said Two Cent Passenger Law; and that plaintiff ought to be compelled to redeem and pay for all the coupons issued by it under said order of this Court.

Prayer.

And now, having answered said bill as fully as these respondents are advised it is material for them to answer, they pray that said preliminary injunction issued herein on the 23d day of August, 1909, may be dissolved as to each and all of them; that the bill in these proceedings be dismissed; that a decree be entered compelling the plaintiff to receive, redeem and pay for as presented to it, or to its agents or officers, the coupons issued by the plaintiff under said order of this Court entered on said 23d day of August, 1909; that a mandatory injunction be issued herein against the plaintiff to these respondents and to all other citizens and taxpayers of West Virginia and the traveling public generally, commanding the plaintiff to restore an intra-state West Virginia passenger charge per passenger per mile of not exceeding two cents for each mile or fraction thereof, as provided in said law; that the plaintiff be enjoined from further violating said chapter 41 of the Acts of the Legislature of West Virginia of 1907, and that these respondents recover of and from the plaintiff, the Norfolk & Western Railway Company, their costs in this behalf most wrongfully expended. And as in duty bound they will ever pray, etc.

WM. G. CONLEY,

Attorney General, State of West Virginia.

GEORGE D. MOORE,

Prosecuting Attorney, Jefferson County.

D. B. HARDWICKE,

Prosecuting Attorney, Wayne County.

S. U. G. RHODES,

Prosecuting Attorney, Mingo County.

ROBERT R. SMITH,

Prosecuting Attorney, McDowell County.

JOHN R. PENDLETON,

Prosecuting Attorney, Mercer County.

WM. G. CONLEY,

Attorney General.

45 STATE OF WEST VIRGINIA,
County of Kanawha, To wit:

William G. Conley, one of the defendants named in the foregoing answer, being duly sworn says that the facts and allegations therein contained are true except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information he believes them to be true.

WM. G. CONLEY, *Defendant.*

Taken, sworn to and subscribed before me in my said county of Kanawha, this the 26th day of July, 1910.

J. L. HEIZER, *Notary Public.*

My Commission expires Sept. 26, 1919.

46 (And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 10th day of November 1910.)

In Equity. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY

VS.

WM. G. CONLEY, Attorney General, et al.

On this, the 10th day of October, 1910, came again the parties, by Holt & Duncan, of counsel for the plaintiff, and William G. Conley, Attorney General for the State of West Virginia, counsel for the defendants, and, by consent of parties, both plaintiff and defendant, the original bill herein is now amended by inserting therein, at the conclusion of the sixth paragraph thereof, the words and figures following, to-wit:

"And the plaintiff further avers that the reduction hereinbefore set forth of its revenues by the Act aforesaid has operated, and would operate, as a confiscation of its property, in violation of the Fourteenth Amendment of the Constitution of the United States."

And the Clerk of this Court is directed to interline said words in said bill.

And, by consent of parties, both plaintiff and defendant, the original answer filed in this cause is now here amended, by inserting therein, at the conclusion of the sixth paragraph thereof, the words and figures following, to-wit:

"And these respondents still further deny, upon information and belief, that the operation of the Act complained of results in the reduction of the plaintiff's revenue to the extent that it works a confiscation of its property in violation of the Fourteenth Amendment of the Constitution of the United States."

And the Clerk of this Court is directed to interline said words in said answer at the conclusion of the sixth paragraph thereof.

(Depositions on Behalf of Plaintiff, Filed in Kanawha Circuit Court Clerk's Office, Kanawha County, West Virginia, on the 12th Day of February, 1913.)

49 In the Circuit Court of Kanawha County, State of West Virginia.

In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

v.

W. G. CONLEY, Attorney General of the State of West Virginia,
et al., Defendants.

Depositions of Jos. W. Coxé, and Others, taken before me, Carl B. Short, a Notary Public in and for the City of Roanoke, in the State of Virginia, pursuant to the notice hereto annexed, at the law office of Lucien H. Cocke, Esq., in the Office Building of the Norfolk & Western Railway Company in the City of Roanoke, State of Virginia, on the third day of October, 1910, between the hours of nine o'clock A. M. and six o'clock P. M., to be read as evidence in behalf of the Norfolk & Western Railway Company in a certain suit in Equity pending in the Circuit Court of Kanawha County, State of West Virginia, wherein the Norfolk & Western Railway Company is plaintiff and W. G. Conley, Attorney General for the State of West Virginia, and others, are defendants.

Present: Theodore W. Reath, Esq., Lucien H. Cocke, Esq., Hon. John H. Holt, Attorneys for Plaintiff.

50 There being no appearance for the defendants, and upon the request of W. G. Conley, Esq., Attorney General of the State of West Virginia, being one of the defendants and counsel for himself and the other defendants, the taking of these depositions is continued until tomorrow, at the same place and between the same hours.

CARL B. SHORT, [SEAL.]
Notary Public.

My commission expires October 7th 1912.

Law Office of Lucian H. Cocke, Norfolk & Western Railway Building.

ROANOKE, VA., *October 4th*, 1910.

Pursuant to the adjournment of yesterday, the taking of these depositions was resumed as follows:

Present:

Theodore W. Reath, Esq., Lucian H. Cocke, Esq., Hon. John H. Holt, Attorneys for Plaintiff.

Hon. W. G. Conley, Attorney General of the State of West Virginia, Attorney for Defendants.

JOSEPH W. COXE, a witness of lawful age, being first duly sworn, deposes as follows:

51 Examination by

Hon. JOHN H. HOLT:

Q. 1. What is your name, age, residence and occupation?

A. Joseph W. Coxе; age 56; residence, Roanoke, Virginia; occupation, accountant.

Q. 2. What official position, if any, do you now hold with the plaintiff, the Norfolk & Western Railway Company?

A. I am the Comptroller of the Norfolk & Western Railway Company.

Q. 3. How long have you occupied that office?

A. Since 1904.

Q. 4. What was your business, Mr. Coxе, prior to that time?

A. I was general auditor of the Norfolk & Western Railway Company for about two years.

Q. 5. And before you became auditor, what did you do?

A. I was auditor of receipts of the Norfolk & Western Railroad from about 1883 to 1896; afterwards auditor of receipts of the Norfolk & Western Railway Company.

Q. 6. Are you familiar with the mileage of the Norfolk & Western Railway Company and the states through which it runs?

A. Yes sir.

Q. 7. You may state through what states it operates a system of railway.

A. The Norfolk & Western Railway Company operates a system of railway through the states of Virginia, Maryland, North
52 Carolina, West Virginia, Kentucky and Ohio.

Q. 8. Can you tell us the aggregate mileage of the system?

A. The aggregate mileage of the system in 1907, main line and branches, was 1,862.71.

Q. 9. What was it June 30th 1908?

A. The total of main line and branches was 1,881.89 miles.

Q. 10. Tell us, please, how much of this mileage was then and is now located in the state of West Virginia, main line and branches.

A. For the year ending June 30th 1907, the total mileage in West Virginia was 432.65, of which the main line represented 240.75, and

the branches 191.90, the branches representing a percentage of 44.2 of the entire mileage of the state.

Q. 11. What was the West Virginia mileage at the end of the fiscal year June 30th 1908?

A. June 30th 1908, the mileage in West Virginia was 444.69, of which the main line was 240.75 and the branches 203.94, the percentage of branches being 45.9.

Q. 12. You may state who makes return to the Board of Public Works for the State of West Virginia of the properties of the Norfolk & Western Railway Company within that state for the purposes of assessment?

A. The report to the State of West Virginia of the property of the Norfolk & Western Railway in that state for purposes of
53 assessment is prepared under my supervision.

Q. 13. Are you familiar with the assessment of its property in that state for the year 1907?

A. I am.

Q. 14. Please give us the total of that assessment for that year.

A. The total of the assessment of the year 1907 of the property of the Norfolk & Western Railway was \$31,000,051.45.

Q. 15. You may tell us whether or not you were familiar with the rate of transportation charged by that road for passengers in the state of West Virginia during the early part of the year 1907, and for some time prior thereto?

A. I am.

Q. 16. What was the transportation rate per mile for passengers in that state during the early part of the year 1907?

A. Up to the 21st of May, 1907, the rate was three cents per mile.

Q. 17. What was it after that time, if anything different, and for what period of time?

A. In accordance with an act of the Legislature the rate was made two cents per mile, effective May 21st, 1907, and continued in effect until September 15th 1909.

Q. 18. By the act of what State Legislature was this two-cent passenger rate established?

54 A. The Legislature of West Virginia.

Q. 19. When does the fiscal year of your company end?

A. The fiscal year of our company ends with June 30th of each year.

Q. 20. Please tell us, if you know, what the gross earnings of the Norfolk & Western Railway Company were from the transportation of intra-state passengers within the state of West Virginia for the year ending June 30th 1907?

A. The gross revenue from transportation of West Virginia intra-state passengers for the year ending June 30th 1907 was \$362,997.74.

Q. 21. What, if you know, were the total gross earnings during the same period of the Norfolk & Western Railway Company from all sources within the State of West Virginia, including the earnings from the transportation of passengers within the state as aforesaid?

A. The gross earnings of the Norfolk & Western Railway in West

Virginia including both intra-state and interstate passengers and freight for the year ending June 30th 1907, was \$8,090,082.56.

Q. 22. What was the total capital, if you know, of the plaintiff within the state of West Virginia for the fiscal year ending June 30th 1907, and allotted to the transportation of intra-state passengers therein?

A. The total capital in the state of West Virginia for the year ending June 30th 1907, and allotted to the transportation of intra-state passengers was \$1,391,902.31.

55 Q. 23. How do you ascertain that fact, Mr. Cox?

A. The total capital employed in the state of West Virginia in the transaction of all business, passenger and freight intra-state and inter-state, was \$31,000,051.45. This total capital was allotted to the several classes of business, intra-state and inter-state passengers, intra-state and interstate freight, on the basis of gross earning. The gross passenger revenue, \$362,997.74 represents 4.49% of the entire gross earnings in the state from all sources. These entire gross earnings were \$8,090,082.56, and \$362,997.74 represented 4.49% of these total gross earnings. This 4.49% is applied to the entire capital in the state of \$31,000,051.45, producing the capital which is allotted to the transportation of intra-state passengers, that is, \$1,391,902.31.

Q. 24. When you state that the gross earnings from passengers is \$362,997.74, do you mean intra-state passenger service?

A. The transportation of intra-state passengers exclusively.

Q. 25. You may state, if you know, what it cost the Norfolk & Western Railway Company per dollar to earn the amount you have stated to be its gross earnings for intra-state passenger service within the state of West Virginia for the fiscal year ending June 30th 1907?

A. For the year ending June 30th 1907, the cost to earn a dollar of intra-state passenger revenue was 85.68 cents, including taxes.

56 Q. 26. What was it, Mr. Cox, if you know, exclusive of the payment of taxes?

A. Exclusive of taxes the cost to earn a dollar was 82.20 cents.

Q. 27. What then, if you know, was the return to the railway company during the fiscal year ending June 30th 1907 from its capital so devoted to the business of transporting intra-state passengers during said year in the state of West Virginia?

A. For the year ending June 30th 1907, the capital allotted to the transportation of intra-state passengers was \$1,391,902.31, and the return thereon was 3.73 per cent. which, however, omits from all consideration the expenditures for additions and betterments charged to Income. If those additions and betterments are included then the rate on the capital would be 2.15 per cent.

Q. 28. During what portion of that fiscal year was three cents per mile charged for intra-state passenger service in West Virginia?

A. The three-cent rate prevailed from July 1st 1906 to May 20th 1907. I think the two-cent rate went into effect on the 21st.

Q. 29. And what was the rate then during the balance of that year?

A. From May 21st to June 30th, the intra-state passenger rate was two cents.

57 Q. 30. Please tell us in detail how you arrive at the figure as stated by you that it cost during the fiscal year before mentioned 85 cents to earn every dollar of the gross receipts from intra-state passenger service in West Va.?

A. Under our system of accounting we separate our expenses into passenger and freight. The entire passenger expenses in the state of West Virginia were \$816,528.76. These expenses are sub-divided between the intra-state and inter-state on the basis of gross earnings. We find that the total expenses in the state, exclusive of Taxes, \$816,528.76, represent 82.2 per cent. of the entire passenger earnings. This 82.2 per cent would, therefore, apply to the gross earnings from intra-state passengers, assuming that the cost of inter-state and intra-state transportation is the same.

Q. 31. As a matter of fact, how do the expenses of intra-state and inter-state passenger service compare?

A. Under our system of working our accounts we do not attempt to differentiate between the cost of intra-state and inter-state. As a general proposition, however, I would state that the intra-state is more expensive to handle than the inter-state.

Q. 32. You may state whether or not your Company in its book-keeping and accounts separates passengers from freight earnings?

58 A. Under our system of accounting we carefully separate our passenger, freight and miscellaneous earnings, and our records will show such separation.

Q. 33. How long has it been the practice of the Norfolk & Western Railway Company to keep its accounts according to this system?

A. The separation of passenger and freight earnings, as well as miscellaneous earnings, has been in effect from the time of the organization of the Norfolk & Western Railway and subsequently by the Norfolk & Western Railway up to the present time.

Q. 34. You may likewise state, if you know, whether or not it has kept and now keeps its expenses separate, that is to say, the freight expenses and passenger expenses.

A. The Norfolk & Western Railroad from the time of its organization has invariably kept the passenger and the freight expenses separately; that not only applies to the Railway Company, but to its predecessor, the Railroad Company.

Q. 35. How is this done, Mr. Coxe?

59 A. All bills providing for the payment of company funds for materials and pay rolls for labor are accompanied by data showing each account charged and each operating district, or operating division to which the disbursement shall be distributed. Where the disbursement is of a general character, such as the pay of general officers, and for the benefit of the entire line, such amounts are distributed over the several operating districts on the basis of loaded and empty car mileage. In making up charges on bills and pay rolls, items which are clearly located to either passenger or

freight are so charged, and where the item is of a general character which cannot be located directly to passenger or freight, the division is made on the basis of engine miles, thus in the year ending June 30th 1907, the freight engine miles were 14,890,615, and the passenger engine miles were 3,796,119, the percentage of passenger being 20%. Every bill entering the accounts of any one month after having the expense account noted thereon as well as the operating division over which it has been distributed, is entered on the summary sheet, first, according to the expense account number, secondly, according to the sub-division of passenger, freight or general, and third, to the operating district. To accomplish this work each month requires some 56 sheets of paper 17 by 13, a separate and distinct account being kept of each month in the year. The various expense accounts to which such expenses are distributed are 116 in number. The Maintenance of Way has 23 primary accounts, Maintenance of Equipment has 29 primary accounts, Traffic Expenses has eight primary accounts, Conducting Transportation has 45 primary accounts, and General Expenses has 11 primary accounts. The operating expenses covered by these 116 primary accounts are thus distributed over five grand divisions, these divisions being Norfolk Division, Shenandoah Division, Rad-

ford Division, Pocahontas Division, and the Scioto Division, 60 the total trackage of all these divisions being 1,862.71 miles.

Having thus determined the amount of expenses coming under each primary account and sub-divided by passenger and freight, the proportion shown to be charged to each district is chargeable to the state in which the division is located, and where the division is located in two or more states, the expenses are divided on the basis of state mileage. Thus, the Shenandoah Division from Roanoke to Hagerstown, 244.16 miles has 209.23 miles in Virginia, or 85.69% of the entire mileage; the state of West Virginia has 19.35 miles, or 7.93% of the entire mileage of the Division, and Maryland has 15.58 miles, or 6.38% of the entire mileage of the division; so that the expenses of this division would be charged, to Virginia 85.69%; West Virginia 7.93%, and Maryland 6.38%. Similarly on the Radford Division, Roanoke to Bluefield the total distance is 105.74 miles; 85.19 miles are in Virginia, representing 80.60%, and 20.55 miles are in West Virginia, representing 19.40%; so that the expenses of this division to be allotted to Virginia are 80.60%, and 19.40% to West Virginia. Similarly, the Pocahontas Division, Bluefield to Williamson, 237.75 miles, has 7.14 miles in Virginia, or 3.03%, and 230.61 miles in West Virginia, or 96.97%; so that the expenses of this division from Bluefield to Williamson to be charged to Virginia are 3.03%, and to West Virginia 96.97%. Similarly with the Scioto Division from Williamson to Portsmouth, we have

161.84 miles in West Virginia, a percentage of 80.58; and 61 39 miles in Ohio, representing a percentage of 19.42; so that the expenses of the line from Williamson to Portsmouth would be chargeable to the state of West Virginia 80.58%, and the state of Ohio, 19.42%. As an indication that care is observed in the separation of passenger and freight, reference is made to the account

"Fuel for Road Locomotives" for the year ending June 30th 1907, and allotted to West Virginia fuel for passenger engines, \$30,413.16, and fuel for freight locomotives \$326,874.63, the percentage of passenger being 8.5; whereas, if the entire fuel for road locomotives was divided on the mileage of engines the charge to the passenger operating expense would have been on the basis of 20%; similarly with Road Trainmen in West Virginia for the year ending June 30th, the passenger road trainmen was \$57,776.09; the freight road trainmen was \$403,069.13; the percentage of passenger being 12.6%; whereas a division on the basis of engine miles would be 20%. Taking the entire expense for the year 1907 in West Virginia, \$5,403,767.10, and applying the percentage on engine mileage, 20%, would yield expense allotted to West Virginia \$1,080,753.42; whereas the expense as divided in accordance with our system of accounting was \$816,528.76, or but 15.1% of the entire expense; these illustrations being given simply to show that an endeavor is made to separate all expenses carefully and clearly between passenger and freight.

62 Q. 36. Mr. Coxe, you have stated that this company has 116 primary accounts, I believe you called them?

A. Yes sir.

Q. 37. Primary expense accounts?

A. Yes sir.

Q. 38. Take the paper now handed you and tell us what it is. (Handing paper to witness.)

A. The statement now before me is Comptroller's Form 26, upon which is summarized each month the expenses of each grand operating division between passenger and freight.

Q. 39. Is that, or is it not, a list of the primary expense accounts to which you have referred?

A. It first shows that principal accounts of Maintenance of Way and Structures, Maintenance of Equipment, Traffic Expenses, Conducting Transportation, and General Expenses. It then shows with the primary accounts under of Maintenance of Way and Structures, from one to 23, under Maintenance of Equipment from 24 to 52 inclusive, Traffic Expenses from 53 to 60 inclusive, Conducting Transportation from 61 to 105 inclusive, and General Expenses from 106 to 116 inclusive.

Q. 40. Will you file that with and as a part of your deposition, marking it Exhibit "A"?

A. I herewith file Comptroller's Form No. 26 as Exhibit "A."

63 Q. 41. You may tell us whether or not other railroads, if you know, observe this same or any like system of separating operating expenses according to whether they are devoted to passenger or freight and incur the expenses incident to such separation and bookkeeping?

A. The separation of operating expenses as between passenger and freight means a considerable amount of clerical labor and additional records, and a good many roads fail to attempt the separation, not caring to go to the expense. The Norfolk & Western Railway, however, has always felt that for the intelligent guidance of its officers and as a matter of knowing the details of the results of its busi-

ness, where it could satisfactorily make the separation and was willing to incur the expense, and we have made this separation on the part of the railway company since its organization in October, 1896, and during the days of the Railroad Company the separation was similarly kept. I would say, however, that some years back the basis of the division of the expenses was somewhat different to what it is today, when the system of the basis of division was train miles, but as our line was extended and through West Virginia, largely a mountainous country where it was necessary in order to economize operation to have most of the freight trains "double-headers," that is two engines to the train instead of one, that we felt the engine mileage basis was more equitable, as charging the freight more equitably with its proper expense, the basis of engine miles being undoubtedly favorable to the passenger business, and realizing

64 that this passenger traffic was the weak part of our business, we have endeavored in every way to help it in our accounts.

Q. 42. What is the practice, if you know, of the Pennsylvania Railroad with respect to this separation?

A. The Pennsylvania Railroad, I only know in a general way, attempt the separation. I am under the impression they divide their General expenses on the basis of train miles. Their situation is different from ours and in working up a division of this kind it is necessary, in order to get fair and accurate results, to consider the peculiar circumstances on each road, and whilst on the Pennsylvania Railroad the train miles might be, and I have no doubt, is the best plan; on the Norfolk & Western Railway the situation with respect to grades and curves is different and in our endeavor to secure good results, largely using "double-headers" on freight traffic, I think that on the Norfolk & Western the engine mileage is undoubtedly preferable to the train mileage.

Q. 43. As I understand you, you first separate operating expenses into two classes, passenger and freight, according to the dividends of the road, and then divide the divisions into states, is that correct?

A. The first process is to determine how much of the expense is passenger and how much freight; the next is to distribute that passenger or freight over the various divisions, charging it to the exact division where used; or where the expense may be of a general nature, such as the salary of the President or officers, that is divided between the operating divisions on the basis of loaded and

65 empty cars, both passenger and freight.

Q. 44. Then what is the next division, if any, that you make?

A. That would give us the operating expenses, first, divided between passenger and freight, secondly, distributed to the expense account, and finally distributed to the operating division, so that we would then work up this sheet at the end of each month, commencing at Norfolk and going to Columbus, and showing all expenses of that division under these primary accounts.

Q. 45. What sheet do you refer to, Exhibit "A"?

A. Yes sir.

Q. 46. But suppose, Mr. Coxe, one of those divisions is partly in

one state and partly in another, then what division do you make, if any, and how?

A. That is sub-divided between the states through which that division runs, on the basis of mileage of track in each state.

Q. 47. How is that done, if you know?

A. The purpose being to get the expense of each state through which the road operates.

Q. 48. Why does that become necessary?

A. We keep our operating expenses by operating divisions, and we sub-divide the divisions by state lines, charging each state with its proper proportion on the basis of track mileage, and in that way we get the expenses in each state through which the road operates.

66 Q. 49. Are you or not required to return, for purposes of assessment or otherwise, these matters to assessing boards in the various states?

A. The earnings and expenses by states are required on our operating reports to the several state commissions, and also on our reports to the Boards of Assessment for taxation purposes.

Q. 50. State whether or not the Norfolk & Western Railway Company separates its passenger earnings from its freight earnings, and if so, by what method it is done?

A. The Norfolk & Western Railway Company separates its passenger earnings from its freight earnings. As far as the passenger business is concerned, these earnings are based upon the agents' monthly ticket reports, upon conductors' cash fare collections on trains, and from interline reports on tickets issued by other companies. Deducting the amounts due foreign companies by the Norfolk & Western on its interline ticket sales.

Q. 51. State whether or not after the gross earnings have been so ascertained, the same are divided into earnings intra-state and inter-state, and if so, by what method?

A. After we determine the gross earnings from the passenger business we proceed to analyze the passenger revenue as between intra and inter-state. This process being to take up the monthly ticket reports of agents, as well as the cash fare reports of conductors, inter-

67 line reports from other companies, and the Norfolk & Western proportion of its inter-line reports to other companies, and abstract the same on what we term Office Abstracts, showing every point from and every point to on the line of the Norfolk & Western Railway between which tickets are sold. Where a ticket originates and terminates in the state and does not pass out of it, it is classified as intra-state passenger traffic. Where it originates in one state and goes into another, then it is classified as inter-state traffic, and in this way we secure the intra-state gross passenger revenue for each state through which the road operates.

Q. 52. After the gross passenger receipts have been ascertained, intra-state and inter-state, how is the net revenue derivable from the one class of business and the other ascertained?

A. The first process is to deduct from the gross revenue the proportion of the expenses in the state chargeable to that revenue.

For the year ending June 30th 1907 the gross earnings being \$362,997.74 for intra-state passenger revenue, the ordinary operating expenses being 82.2 cents on the dollar, \$298,384.14, leaving net earnings for operations of \$64,213.60. From this is deducted the item of taxes, the total taxes in the state being \$258,745.96, this total amount is distributed to each class of business on the basis of gross earnings. The gross earnings from intra-state passenger revenue being \$362,997.74 and the entire gross earnings \$8,000,000.

68 082.56, the gross earnings from intra-state passenger revenue represents 4.49% of the total earnings in the state, and, therefore, we applied this 4.49% to the aggregate amount of taxes of the system in the state, \$258,745.96, which produces an amount of \$12,617.69, which is the proportion of the taxes for the year ending June 30th 1907 allotted to the intra-state passenger traffic in West Virginia. The net earnings from operation from intra-state passenger traffic is, therefore, the net earnings for operation, \$64,213.60, less the proportion of taxes, \$12,617.69, or a surplus applicable to Interest and Dividends of \$51,595.91.

Q. 53. And what per cent. return on the capital in West Virginia devoted to intra-state passenger service for the fiscal year ending June 30th 1907 would this make?

A. This surplus of \$51,595.91 would yield a return on the capital allotted to the intra-state passenger revenue, \$1,201,992.31, of 3.73%, this being the return leaving out of consideration any question of expenditures for additions and betterments charged against Income, and being for the year ending June 30th 1907.

Q. 54. Take the paper now handed you and tell us what it is. (Handing paper to witness.)

A. The statement just handed me is a summary of the freight and passenger traffic of the Norfolk & Western Railway system and the state of West Virginia, analyzing the traffic as between intra- and inter-state and for the year ending June 30th 1907.

69 Q. 55. Please explain that statement.

A. This statement is a general summary of the situation, first showing the gross earnings on the entire system as between passenger revenue, miscellaneous passenger earnings, total passenger earnings, freight revenue, miscellaneous freight earnings, total freight earnings and a grand total of passenger and freight earnings for the entire system of the Norfolk & Western. Following this is a statement of the entire traffic in the state of West Virginia showing the gross earnings from transportation of passengers, miscellaneous passenger earnings, and total passenger earnings, revenue from freight transportation, miscellaneous freight earnings, total freight earnings, and the grand total passenger and freight earnings in the state of West Virginia. Following this is a summary of the West Virginia intra-state traffic showing the revenue from transportation of intra-state passengers, miscellaneous passengers, intra-state, total intra-state passenger earnings, freight revenue intra-state, miscellaneous earnings, freight intra-state, total intra-state freight earnings and a grand total passenger and freight earnings intra-state for the state of West Virginia. Following this is a statement of the inter-

state traffic showing first the revenue for transportation of interstate passengers, miscellaneous earnings credited to interstate passenger earnings, and the total interstate passenger earnings; earnings from transportation of interstate freight, miscellaneous interstate freight earnings, and interstate freight earnings and the grand total of interstate passenger and freight earnings in West Virginia. Following this is a summary showing the ratio of per cent, and explaining the relationship of interstate passenger earnings to the total state earnings, mileage of the system and mileage in West Virginia. Also showing the passenger for the entire system and West Virginia, passengers-one mile, West Virginia and passengers-one mile, entire system, the statement being simply a summary of the general passenger and freight situation in the state.

Q. 56. From what has that statement been made up and by whom?

A. This statement is made up from the records and accounts of the Accounting Department of the Norfolk & Western Railway, and under my supervision.

Q. 57. You may state whether or not it is correct.

A. I think the statement may be considered correct, it being once susceptible of check and verification.

Q. 58. Please file it with and as a part of your deposition, marking it Exhibit "B. No. 1".

A. I herewith file summary of freight and passenger traffic of the Norfolk & Western Railway system and the state of West Virginia, analyzing the traffic as between intra- and interstate for the year ending June 30th 1907, to be known as Exhibit "B. No. 1".

Q. 59. Tell the paper any limited you will state what it is.

A. The statement just handed me is a summary of the West Virginia traffic showing passenger and freight interstate and intra-state, first showing the gross earnings on each class of traffic, the ordinary operating expenses, the net earnings from operations, deductions for taxes, and further expenses particularly related to us hereinafter, and finally the surplus applicable to the interest and dividends and the reserve which such surplus yields as that portion of the total capital of the state based upon the assessment for taxation purposes which is allotted to each particular class of business, and finally showing the passenger and freight amounts for the intra-state and interstate, passengers intra- and interstate, freight and the total results for the entire business in the state.

Q. 60. For what year?

A. For the year ending June 30th 1907.

Q. 61. Tell us, please, from what that statement is made up and by whom?

A. This statement is made up under my immediate supervision from the summaries of the intra-state and interstate earnings which are, in turn, prepared from the ticket reports, available records, or when the operating expenses being taken from our records kept for that purpose, and our taxation and deductions for utilities and

betterments being similarly taken from our regular records in which such accounts are kept.

Q. 62. You may tell us whether or not that is a correct statement.

72 A. I will say that the statement is one which represents the true situation in the state of West Virginia.

Q. 63. Will you file it with your deposition and as a part thereof, marking the same Exhibit "B. No. 2".

A. I herewith file same, marking it Exhibit "B. No. 2".

Q. 64. I note, Mr. Coxe, that in the statement just filed and marked Exhibit "B. No. 2" there occur the following expressions "Rate of return including further expenses," and "Rate of return excluding further expenses". Please explain what is meant by these.

A. I would say that in drawing up the bill filed by the Norfolk & Western Railway Company, it was based upon returns which exclude any consideration of further expenses other than operating, or what is generally referred to as "Betterments". In accordance with the rulings of the Interstate Commerce Commission we have a class of operating expenses which cover purely the bare cost of operation as well as the current repairs to the property. In addition to these expenditures we have a further class of expenditures which while not strictly operating expenses are yet of such a character that they cannot or should not be capitalized, and if not capitalized must necessarily come out of the gross earnings. These expenditures referred to in the Exhibit as "Further Expenses" include such items as replacement of bridges, the abandonment of grade crossings, fencing, additions to stations, re-lining tunnels, tool equipment, automatic signals, and that proportion of double-tracking covering the feature of revision of lines and grades.

73 It will be noted from the foregoing that the general class of improvements mentioned are not such as would add actual additions to the physical property, but are more in keeping the road in thoroughly up-to-date shape, and adding to the safety of travel and meeting the increasing demands of the transportation public.

Q. 65. You may state whether or not the further expenses just described by you and called "Betterments" should in your judgment be deducted from gross earnings before ascertaining the net revenue?

A. There is little question in my mind as to the propriety of the deduction of these expenditures from the gross earnings before arriving at the amount which is applicable to Interest and Dividends. If they are not deducted from the gross earnings it would be necessary for the company to secure securities and the interest on such securities would have to be provided for. As a result, in the course of years the property invested would be top-heavy and the burden on the public would be increased.

Q. 66. You may state whether or not these Betterments or further expenditures, were deducted from the gross earnings derivable from intra-state passenger service in the state of West Virginia for the fiscal year ending June 30, 1907, for the purposes of ascertaining the net earnings of that branch of the service.

A. The expenditures for further expenses, or betterments,

74 was not deducted from the gross earnings on intra-state passenger revenue in the state of West Virginia for the year ending June 30th 1907, in arriving at the results applicable to the proportion of the capital allotted to intra-state passenger traffic.

Q. 67. Please tell us, if you know, what the result would have been had they been deducted?

A. The total expenditures for further expenses other than operating, or additions and betterments, in the state of West Virginia for the year ending June 30th 1907, was \$490,779.85. This total disbursement is allotted to the several classes of business on the basis of gross earnings the revenue from transportation of intra-state passengers being \$362,997.74, and the total earnings in the state from all sources being \$8,090,082.56, the gross revenue from transportation of intra-state passengers represented 4.49% of the entire earnings of the state. This percentage is, therefore, applied to the total expenditures to further expenditures on operations or betterments, \$490,779.85 yielding an amount of \$22,036.02, chargeable to the intra-state passenger traffic. With this deduction of the proportion of further expenses other than operating, the surplus applicable to Interest and Dividends on the transportation of Intra-state passengers would have been \$29,959.89, which applied to the portion of the capital allotted to the transportation of intra-state passengers \$1,391,902.31, produces return of 2.15%.

75 Q. 68. I likewise notice in Exhibit "B No. 2" a heading "Passenger figures used in drafting bill". Please explain what is meant in the statement by this.

A. On Exhibit "B. No. 2" for the year ending June 30th 1907, the item of gross earnings from transportation of intra-state passengers appearing in the Column "Passenger figures used in drafting bill" represents the revenue from transportation of intra-state passengers exclusively and does not include any of the miscellaneous passenger earnings in the way of mail, express, union news, and the numerous items of passenger train earnings. The figures on the statement to the right of this column "Passenger figures used in drafting the bill" include the miscellaneous passenger and freight earnings.

Q. 69. You may state whether or not if the passage by the Legislature of the state of West Virginia on the 20th day of February, 1907, of the act entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the Violation Thereof," which act was approved by the Governor on the 24th day of February, 1907, and went into effect on the 21st day of May, 1907, the Norfolk & Western Railway Company established in said state a two-cent passenger rate?

A. In accordance with the act of the Legislature the Norfolk & Western Railway introduced a two-cent intra-state passenger rate, effective May 21st 1907.

76 Q. 70. You may further state, if you know, how long it kept up that rate.

A. The two-cent passenger rate was kept in effect until September 15th 1909.

Q. 71. And what was the cause of the change at that date, if any change was made, and if you know?

A. Beginning with the 15th of September, 1909, the rate was increased to two and one-half cents, as I understand, resulting from a bill filed by the Norfolk & Western Railway asking that the rate be suspended.

Q. 72. Do you mean the bill filed in this present case?

A. The bill filed in this present case.

Q. 73. You may give us, if you know, the gross earnings of the Norfolk & Western Railway Company derived from the transportation of intra-state passengers within the state of West Virginia for the fiscal year ending June 30, 1908.

A. The gross earnings of the Norfolk & Western Railway from the transportation of intra-state passengers in the state of West Virginia for the year ending June 30th 1908, was \$289,943.22.

Q. 74. You may likewise give us, if you can, the expenses necessarily incident to the earning of that sum.

A. The ordinary operating expenses incident to earning the \$289,943.22 of intra-state passenger transportation was \$265,298.05.

77 The cost of earning a dollar of gross transportation revenue including taxes being 95 cents for the year ending June 30th 1908.

Q. 75. You may likewise state whether or not you ascertained this cost in the same way that you have described its ascertainment for the year ending June 30th 1907?

A. Precisely the same process was followed in the year ending June 30th 1908 in determining the cost to earn a dollar of intra-state passenger business as prevailed in the year ending June 30th 1907.

Q. 76. Then, it cost more to earn a dollar in that department in the year ending June 30th 1908 than it did during the year ending June 30th 1907, is that so?

A. That is the case. I would like to modify that a little bit. I think that expense should be 91.5 excluding taxes; it is 95 cents including the taxes.

Q. 77. Now, you may explain why, if you can, and if you know, this increased expense occurred.

A. This increased cost to earn a dollar is explained by the fact that in the year ending June 30th 1908 the earnings were reduced by the application of the two-cent passenger rate, whilst for the year ending June 30th 1907 the three-cent rate prevailed from July 1st 1906 to May 21st 1907, so that whilst the operating expenses might not have been any more, the cost to earn a dollar has increased by the fact that the gross earnings were considerably less than in the previous year, owing to the introduction of the 2-cent passenger rate which prevailed during the year 1908.

78 Q. 78. You may state, if you can, what the net earnings for the fiscal year ending June 30th 1908, derived from the transportation of intra-state passengers within the state of West Virginia,

were, that is to say, they constituted what per cent. per annum on the capital of the railroad invested in that state and allotted to intra-state passenger service?

A. The gross revenue from transportation of intra-state passengers for the year ending June 30th 1908, \$289,943.22, and the cost of earning this business was \$265,298.05, this latter amount leaving out of consideration any expenditures for additions and betterments, and being strictly the operating expenses. The net earnings resulting therefrom was \$24,645.17. Deducting from this net earnings, \$24,645.17 the proportion of taxes allotted to the intra-state passenger transportation, or \$10,221.74 leaves a net balance of \$14,423.43 applicable to Interest and Dividends. The proportion of the entire state capital allotted to the transportation of intra-state passenger business was \$1,391,902.21, and the rate of return on this capital excluding any consideration of further expenses or betterments is 1.04%.

Q. 79. That is for the fiscal year ending June 30th 1908?

A. For the fiscal year ending June 30th 1908.

Q. 80. You may state whether or not in ascertaining this per cent. showing the return, you applied the same methods that you

79 have described as having been applied in connection with the fiscal year of 1907?

A. In arriving at this return of 1.04% on the proportion of capital allotted to the intra-state passenger business during the year ending June 30th 1908 when the two-cent rate prevailed, it was exactly similar to the methods adopted in arriving at the returns for the year ending June 30th 1907 when the three-cent rate prevailed.

Q. 81. Tell us if you know whether or not the actual capital of the Norfolk & Western Railway Company in the state of West Virginia during the fiscal year ending June 30th 1908 and devoted to the transportation of intra-state passengers therein was greater or less in amount than the capital devoted by the said company in said state to the transportation of intra-state passengers during the fiscal year ending June 30th 1907.

A. It was certainly no less.

Q. 82. Take the paper now handed you and tell us what it is. (Handing paper to witness).

A. The statement just handed me is a summary of the freight and passenger traffic on the Norfolk & Western Railway system and for the state of West Virginia, analyzing the traffic between intra-state and inter-state for the year ending June 30th 1908.

Q. 83. How, by whom, and from what was that statement made up?

A. That statement is prepared from the books and records
80 of the company and under my general supervision.

Q. 84. You may state whether or not it correctly shows the situation that it purports to cover.

A. It is my belief it presents the correct situation of the passenger and freight traffic not only for the Norfolk & Western entire system, but for the situation in West Virginia.

Q. 85. Will you please file it with and as part of your deposition, marking the same Exhibit "C No. 1"?

A. I now file summary of freight and passenger traffic of the Norfolk & Western Railway system and for the state of West Virginia analyzing the traffic between intra-state and inter-state for the year ending June 30th 1908, and mark the same Exhibit "C No. 1".

Q. 86. Take the paper now handed you and tell us what it is. (Handing paper to witness).

A. The statement just handed me is a summary of West Virginia traffic showing passenger and freight intra-state and inter-state for the year ending June 30th 1908, displaying first the gross earnings, ordinary operating expenses, net earnings from operation, surplus applicable to Interest and Dividends, assessed values of properties for taxation, rate of return including further expenses or betterments, and rate of return excluding further expenses or betterments, showing these results both for the intra-state freight and passenger, and for the business generally in the state for the year ending June 30th 1908.

81 Q. 87. From what, how and by whom was that statement made up?

A. This statement was made up from the books and records of the Norfolk & Western Railroad Company kept in the Accounting Department and prepared under my supervision.

Q. 88. You may state whether or not it correctly shows the situation?

A. It is my belief that the statement shows the true situation of the intra-state passenger traffic and results on the capital allotted thereto in the state of West Virginia for the year ending June 30th 1908.

Q. 89. Will you file that statement with and as part of your deposition, marking same Exhibit "C No. 2"?

A. I herewith file the statement to be marked Exhibit "C No. 2".

Q. 90. Do you know what the assessment of the property of the Norfolk & Western Railway Company in the state of West Virginia was for the year 1908?

A. The assessment on the property of the Norfolk & Western Railway Company in the state of West Virginia for the year 1908 was \$31,000,000.00.

Q. 91. Tell us, if you know, how the capital of the Norfolk & Western Railway Company in the state of West Virginia and devoted to the transportation of intra-state passengers therein compared in the fiscal year of 1909 with the fiscal year 1908?

82 A. The capital allotted to the gross earnings of transportation of intra-state passengers for the year ending June 30th 1909 was \$1,391,902.21, being the same as in the year ending June 30th 1908.

Q. 92. What was the railway assessment in the state of West Virginia, if you know, for the year 1909, by the Board of Public Works of that state?

A. \$32,000,000.00.

Q. 93. Tell us, if you know, the amount of gross earnings derived

by the Norfolk & Western Railway Company from the transportation of intra-state passengers within the state of West Virginia for the fiscal year ending June 30, 1909?

A. The gross earnings from transportation of intra-state passengers in the state of West Virginia for the year ending June 30th 1909 was \$281,864.50.

Q. 94. I see it is stated in the bill that \$277,557.05 please explain that difference if you can.

A. As I now recall it, at the time the framing of that bill was considered we only had the earnings analyzed I think to March of that year, and we estimated the other three months. When the results of the year were finally ascertained and the exhibit now before me made up, we, of course, used the actual earnings for the year.

Q. 95. Tell us, if you know, what it cost per dollar to earn that sum of money.

A. The cost to earn a dollar intra-state passenger transportation for that year and not including therein the item of taxes was 97.06 cents.

Q. 96. What was it including taxation?

A. Including taxation, the cost to earn a dollar was 100.55 cents.

Q. 97. You may state whether or not you have arrived at these percentages by the same method as described by you with reference to the fiscal year ending June 30th, 1907.

A. Exactly the same method of procedure was adopted in arriving at the results for the year ending June 30th 1909 when the two-cent rate prevailed as was followed for the year ending June 30th 1907 when the three-cent rate prevailed from July 1st 1906 to May 21st 1907.

Q. 98. What percent, if you know, was the net earnings for the fiscal year ending June 30th 1909 derived from the transportation of intra-state passengers within the state of West Virginia of the capital of the plaintiff invested in said state, and allotted to such service?

A. The gross earnings of intra-state passengers transportation of the state of West Virginia for the year ending June 30th 1909 was \$281,864.50; deducting therefrom the ordinary operating expenses \$273,577.68, leaves as net earnings from operation \$8,286.62. The taxes in West Virginia for the year ending June 30th 1909 were in total \$271,045.17. This amount being allotted to the several classes of business on the basis of gross earnings, and as the intra-state passenger transportation earnings form 3.63% of the entire earnings in the state, this percentage was applied to the total taxes paid, or \$271,045.17, yielding an amount chargeable to the intra-state passenger transportation earnings of \$9,838.94, leaving a deficit of \$1,522.12, so that there was no return accruing on the capital allotted to the intra-state passenger transportation, \$1,391.902 21.

Q. 99. Have you statements covering the fiscal year ending June 30th 1909 similar to those you have filed for the fiscal years ending respectively June 30th 1907, and June 30th 1908?

A. I have.

Q. 100. Take the paper now handed you and tell us what it is.

A. The paper now handed me is a summary of freight and passenger traffic for the Norfolk & Western Railway system and state of West Virginia analyzing the traffic as between intra-state and inter-state for the year ending June 30th 1909.

Q. 101. From what, by whom, and how was same made up?

A. This statement was made up from the records and accounts in the Accounting Department of the Norfolk & Western Railway Company, and under my general supervision.

Q. 102. State whether or not it correctly shows the situation of which it treats.

A. I believe it is a true presentation of the accounts of this particular business applying not only to the Norfolk & Western system, but to the state of West Va.

85 Q. 103. Please file same with and as part of your deposition and mark same Exhibit "D No. 1."

A. I herewith file said statement or summary of freight and passenger traffic and mark the same Exhibit "D No. 1," and showing results for the year ending June 30th 1909.

Q. 104. Take the paper now handed you and tell us what it is.

A. The statement just handed me is a summary of West Virginia traffic showing passengers and freight intra-state and inter-state for the year ending June 30th 1909, showing first the gross earnings on both classes of traffic, freight and passengers intra-state and inter-state, the ordinary operating expenses, net earnings from operation, deductions for taxes and further expenses other than operating, surplus applicable to Dividends, assessed value of the property for taxation, and division of same between the several classes of business above referred to.

Q. 105. From what, by whom, and how was that statement made up?

A. This statement was made up from the records and accounts kept in the Accounting Department of the Norfolk & Western Railway, and under my supervision.

Q. 106. You may tell us whether or not it correctly shows the situation with respect to which it purports to speak.

86 A. My belief is it is a correct presentation of the situation in West Virginia pertaining to the transportation of intra-state passenger traffic.

Q. 104. Please file this statement with and as part of your deposition and mark same Exhibit "D No. 2."

A. I herewith file summary of West Virginia traffic showing passenger and freight intra-state and inter-state for the year ending June 30th 1909, and mark the same Exhibit "D No. 2."

Q. 105. You may state what effect, if you know, the imposition of the two-cent passenger rate in the state of West Virginia has had upon the revenues of the Norfolk & Western Railway Company derivable from that service in that state, as compared with the year 1907 when the three-cent rate was in force.

A. For the year ending June 30th 1907 the intra-state passengers

were 815,506, the equivalent intra-state passenger-one-mile was 13,025,247, and the revenue earned thereon was \$362,997.74, yielding an average rate per passenger per mile of 2.79 cents, this being in the year when the three-cent rate prevailed up to May 21st 1907. During the year ending June 30th 1908 the intra-state passengers were 965,223, the equivalent passenger-one-mile intra-state 14,995,214, and the gross transportation revenue earned thereon was \$289,943.22, or an average rate of passenger per mile of 1.93 cents, the two-cent intra-state passenger rate being in effect during this entire year. The intra-state passenger revenue for the year ending June 30th 1907 being \$362,997.74 and for the year ending June 30th 1908 the intra-state gross passenger revenue being \$289,943.22 indicated a loss as compared with 1906-1907 on this intra-state passenger transportation of \$73,054.52. This, in spite of the fact that passengers-one-mile had increased 1,969,967. For the year ending June 30th 1909, the gross transportation revenue from intra-state passenger revenue within West Virginia was \$281,864.50, as compared with the year ending June 30th 1907, when the three-cent rate prevailed of \$362,997.74, and as compared with the year ending June 30th 1908 when the two-cent rate prevailed of \$289,943.22, the results for the year ending June 30th 1909 showing a loss as compared with the year ending June 30th 1908 of \$8,078.72, and compared with the year ending June 30th 1907 when the three-cent rate prevailed, a loss of \$81,133.24 on the intra-state passenger transportation within West Virginia. The passengers-one-mile for the year ending June 30th 1909 were 14,592,621, as compared with the year ending June 30th 1907 of 13,025,247, the intra-state passenger business summarizing for the year ending June 30th:

	Passengers.	Passengers-one-mile.	Return.
1907	815,506	13,025,247	\$362,997.74
1908	965,223	14,995,214	289,943.22
1909	1,067,991	14,592,621	281,864.50

88 Q. 106. Mr. Cox, how much, if you know, does the Norfolk & Western Railway Company earn within the state of West Virginia per mile of track for passenger services rendered?

A. For the year ending June 30th 1907, the passenger revenue per mile of road in West Virginia was \$1,889.00. In 1908 when the two-cent rate prevailed it was \$1,554.00 per mile, and in 1909 when the two-cent rate prevailed it was \$1,376.00.

Q. 107. You may state whether or not this includes both inter-state and intra-state services?

A. That is the entire revenue per mile in West Va.

Q. 108. What is it per mile upon the rest of the system outside of West Virginia?

A. The passenger revenue per mile in 1907 was \$2,340, in 1908 \$2,228.00, in 1909 \$2,028.00; the excess of the Norfolk & Western system outside of West Virginia over that of West Virginia was,

therefore, in 1907, \$451.00 per mile, in 1908 it was \$674.00 per mile, and in 1909 \$652.00 per mile.

Q. 109. What is the rate chargeable for passenger service in the state of Virginia?

A. Two and one-half cents.

Q. 110. What in the state of Ohio?

A. Two cents in the state of Ohio.

Q. 111. What in North Carolina?

A. Two and one-half cents.

89 Q. 112. What is it in Maryland?

A. Three cents.

Q. 113. You may state whether or not it was at any time in the state of Virginia less than two and one-half cents, and if so, what the history of that situation was.

A. In the state of Virginia prior to October 1st, 1907, the rate was three cents. In accordance with an order of the Corporation Commission it was reduced to two cents, which became effective October 1st, 1907. That rate continued until May 3rd, 1909. In the meantime the railway company had entered into litigation with the state, and while the litigation was not completed the Corporation Commission consented to give us a rehearing of the case, and as a result of that, the two and one-half rate became effective on May 3rd, 1909, and has continued from that time on.

Q. 114. What was the experience of the road, if you know, in this respect in the state of North Carolina?

A. The state of North Carolina, my recollection was they first made the rate two and one-quarter cents; litigation followed and the Legislature compromised by making the rate two and one-half cents.

Q. 115. What is the character of the *company* with respect to its population, whether dense or sparse in the counties of West Virginia through which the Norfolk & Western Railroad runs?

90 A. The County of Jefferson on the line of the Shenandoah

Valley railroad is an agricultural country and it might be termed as rather sparsely populated, there being no towns of any importance on it, Shepherdstown being at the northern terminus on the Potomac River, which has never perceptibly grown; Charlestown has improved a little, but as a general proposition I would say the population there was rather light. Coming further on the line into Mercer and McDowell, we have the town of Bluefield, Mercer County, with a population of probably 15,000, and passing into McDowell County while it has a lack of prosperity along the line of the railway on account of the numerous coke ovens and coal mines, the population is simply on the surface and along the line of the railway and does not extend back into the county; and, going westward after you pass Welch, which is a small town, no settlement of any importance is passed until Williamson is reached with about 5,000 population. Beyond there on the Old Line via Dingess and Dunlow and on the New Low Grade Line, Naugatuck, Fort Gay and Kenova. Through Mingo and Wayne Counties the country is very thinly settled.

Q. 116. You may state, if you know, whether or not the business

of the Norfolk & Western Railway Company during your connection with that road and its operation has been economically managed?

A. I have little hesitancy in stating that on my entire experience with the Norfolk & Western Railway and prior to that with the Railroad Company, that it has always been handled intelligently and economically. It is true in 1896 the road was reorganized but that was not as a result of any bad management or lack of intelligence. The road had been developed ahead of the country and the revenues were not sufficient to pay interest on bonds.

Q. 117. What would you say with respect to the character of its management and the operation of its business from the beginning of the fiscal year 1907 to the present time?

A. I should say that the same standard which prevailed prior to that time has continued, the road being handled with intelligence and economy.

Q. 118. When was the Norfolk & Western Railway Company organized?

A. The Norfolk & Western Railway Company was organized on October 1st, 1896.

Q. 119. You may state whether or not it has paid dividends during its entire history?

A. The preferred stock received no dividends until 1898, and since that time has paid regularly four percent.

Q. 120. What about the common stock?

A. The common stock, which represents about 75% of the entire stock, received no dividend until 1901, when one per cent. was paid; in 1902, two percent.; in 1903, 1904, and 1905, three percent.; in 1906, four percent.; in 1907, five percent.; 1908, four and one-half percent.; 1909, four percent., and in 1910, five percent.

Q. 121. Can you state the average dividends received by the common stockholders from the organization of the company in 1896 down to June 30th, 1910?

A. The average for the 13 $\frac{3}{4}$ years ending June 30th, 1910, would represent 2.51% dividend on the common stock.

Q. 122. What percent. of the entire stock does the preferred represent?

A. In round numbers about 25%.

Q. 123. Can you tell us what amounts have been actually expended for Betterments from the date of the organization of the Norfolk & Western Railway in 1896 to the year ending June 30th 1910?

A. Over \$23,000,000.00.

Q. 124. You may state whether or not this was paid out of income?

A. That was entirely paid out of income.

Q. 125. What is the dividend provided for preferred stock?

A. Preferred stock which took the place of some of the bonds of the old company, being given in exchange for bonds at the time of reorganization of the old company, is limited to four percent.

Q. 126. Suppose, now, Mr. Cox, the preferred stock had received four percent. dividends from the time of the organization of the

road in 1896 down to the end of the year, June 30th, 1910, and the common stockholders had received dividends to the amount of five percent. per annum what would those dividends, if you
93 know, have amounted to?

A. Had the preferred stockholders received a uniform dividend of four percent. from the time of the organization of the Norfolk & Western Railway to June 30th, 1910, it would have represented an amount of \$12,585,021.83, and had the common stockholders received a uniform rate of dividend of five percent. per annum from the time of the organization of the Norfolk & Western Railway Company October 1st, 1896, to June 30th, 1910, it would have represented an amount of \$44,386,608.28, the total of the two dividends, the preferred \$12,585,021.83, and the common, \$44,386,608.28, represents a total of \$56,971,630.11.

Q. 127. What did these stockholders really receive during that period?

A. The preferred and common stockholders actually received in this period, October 1st, 1896, to June 30th, 1910, an average dividend of 2.85%, or \$34,218,714.50.

Q. 128. What then would you say was the difference between what they could reasonably have expected over what they actually received in dividends?

A. The excess of what they could have reasonably expected on the basis of preferred stock receiving four percent., and the common stockholder five percent., over what they actually did receive in dividends during the period to June 30th, 1910, was \$22,752,915.61.

Q. 129. And the amount actually expended for Betterments during that period was what?

A. Something over \$23,000,000.00.

94 Q. 130. Mr. Coxe, in the second paragraph of the bill filed in this case it is charged that the average rate per passenger per mile received by this company from its intrastate passengers in the state of West Virginia approximated the sum of 2.94 cents per mile. In paragraph Two of the answer filed by the defendants it is denied that the average rate of fare per passenger per mile during the year ending June 30th, 1907, approximated 2.94 cents, but on the contrary it is averred that said rate of fare was only 2.364 cents, as shown by the report of the Norfolk & Western Railway Company to the Board of Public Works of West Virginia. Now, will you please state specifically the facts with reference to these allegations, with such explanations in connection therewith as may appear to you to be proper?

A. After the West Virginia Legislature had passed the law introducing the rate of two cents per mile on intra-state passenger business in West Virginia and when our management was desirous of knowing what the result of the rate might be, certain statements were made up, and to the close of March, 1908, the average rate was 2.94 cents, the intra-state rate at this time being three cents per mile. In the meantime, the two-cent rate became effective and at the end of June, as a result of said two-cent rate being introduced, the average rate per passenger per mile for the year ending June

30th 1907 had dropped to 2.79. At the time of drawing up our bill, this statement to the end of March was no doubt before us
95 and the figures were used in error. The answer of the state of West Virginia, however, is in error in stating that the rate was only 2.364, this latter rate being the average rate per passenger per mile on the Norfolk & Western system for the year ending June 30th 1907, and not the average per passenger per mile in the state of West Virginia.

Q. 131. Also in Paragraph Two of the answer of the defendants it is charged that the Railway Company shows by its report for the year 1907 to the Board of Public Works for the State of West Virginia that its earnings on the capital invested in West Virginia in its passenger traffic during said year were largely in excess of six per cent. per annum after the payment of all taxes and other expenses and the expenditure of large sums for maintenance of equipment and improvements. Will you please refer to that report, analyze and discuss same with reference to the charge just recited?

A. For the year ending June 30th 1907 the rate of return on the capital allotted to the transportation of intra-state passengers was 3.73% excluding from the calculation any allowance for expenditure for additions and betterments. If such expenditures are included and deducted from the net returns, then the rate of return on the capital allotted to the transportation of intra-state passengers for the year ending June 30th 1907, would be 2.15. The difference
96 between this rate and that claimed by the State of West Virginia is explained I believe by the state of West Virginia in its calculations assuming that the cost to earn a dollar of gross earnings was the same on all classes of business. This, of course, we dispute claiming that the cost to earn a dollar of passenger business is vastly in excess of the cost of earning a dollar of all business.

Q. 132. Towards the conclusion of the second paragraph of the answer of the defendants it is claimed that the passenger traffic earnings in the state of West Virginia for the year of 1907 was sufficient to pay about 19% per annum on the \$1,391,902.21, which is the capital allotted to intra-state passenger business in West Virginia and that for the subsequent years ending June 30th 1908 and June 30th 1909 said earnings would be sufficient to pay slightly less than 19% per annum. Please explain said reports with reference to this charge that the company earned during these three years about 19% upon the capital allotted to its intra-state West Virginia passenger business and find, if you can, how the error in this charge, if error there be, was apparently made so far as you can understand the claims.

A. From my understanding of the matter, I feel that the statement is in error as to the capital allotted to the intra-state passenger business in West Virginia earning 19%, and that the error is based upon, first, the erroneous assumption that the cost to earn a dollar
97 of all classes of business is the same; this, we, of course, dispute, claiming that there is a vast difference in the cost of earning a dollar of intra-state, inter-state or all passenger

business in West Virginia, as compared with all freight business. Secondly, I am inclined to believe that the erroneous statement has been made from the fact that the state has in all probability taken the gross earnings on our passenger business in West Virginia and applied it to the capital allotted to the transportation of intra-state passengers only; whereas, if the entire passenger earnings of the state are to be considered it should be applied, of course, to the capital appropriated to both intra-state and inter-state passenger traffic.

Q. 133. Why does it seem to you that the error has been made in the answer of the defendants of applying all earnings from both inter-state and intra-state passenger business as a return upon the capital allotted simply to the intra-state passenger business?

A. Simply from the fact that applying the results of the entire passenger business to the capital allotted to the intra-state passenger business would yield a little over 19%.

Q. 134. In the third clause of the fifth paragraph of the defendant's answer it is charged that the statement in the bill that the gross earnings from intra-state passenger business of West Virginia for the year ending June 30th 1908 was in excess of the sum of \$289,943.22 as alleged in the bill and it is also stated that the cost

of earning said passenger business was not approximately 98 95% thereof, and that the net earnings derived by the company from its intra-state West Virginia passenger business after the payment of taxes and all expenses and charges connected therewith was largely in excess of 6% per annum on the capital allotted to that purpose. Now, I ask you to state the facts in connection with these several propositions as alleged.

A. My recollection of this particular matter is that on our original figuring we only had the results for nine months for the year ending June 30th 1908, and I am under the impression that our bill states that the balance of the year is estimated. When we finally wound up results for the year ending June 30th 1908 we confirmed the actual figures in our exhibits and also in making our report to the Board of Public Works for taxes. My conclusion is we reported to the Board actual earnings for the year. I would, therefore, state in conclusion that the gross earnings in transportation of intra-state passengers for the year ending June 30th 1908 and not including any miscellaneous earnings in the way of mail, express, baggage, storage, et cetera, was \$249,943.22, the earnings amounting to the capital allotted to the transportation of intra-state passengers for the year ending June 30th 1908 and excluding from the calculations an allowance for betterments, was 100%. I presume the statement is made by the state of West Virginia to the effect that the earnings were considerably over six per cent, was based on the erroneous assumption that the cost of earning a dollar of intra-state passenger transportation was the same as earning a dollar of all classes of business in the state of West Virginia for the year ending June 30th 1908. This, of course, we dispute, claiming that the cost to earn a dollar of intra-state passenger revenue is vastly in

gross of the average cost of earning a dollar of all classes of business in the state.

Q. 130. Do those matters all as you have explained appear in the exhibits that you have heretofore filed with your deposition?

A. Yes sir.

Q. 131. In Paragraph 11 of the answer of the defendants there are statements made purporting to be based upon the annual reports of this company made to the Board of Public Works of the state of West Virginia to the effect that on the entire business of the company in West Virginia, including its telegraph and telegraph freight and passenger business, there are added for the years ending June 30th 1907, 1908 and 1909, a sum of some eight or nine percent on the value of the property of the company assessed by it for taxation in West Virginia, and some six or seven percent on the value of the property of the company in West Virginia as assessed by the Board of Public Works. Please give another the percentages mentioned are substantially correct or not, together with any objections that you may have to offer to the accuracy of the calculations which is adopted in the answer of the defendants.

A. As far as I could see in reading over the answer and attempting to verify the calculations, they seemed to have been correctly made, but they did not seem to me to have any bearing on the case for the reason that I have since reflected that in those hearings, the matter was confined to that class of business concerning which the issue was in question. I think if I was the proper person to go into it all, and take the entire business situation of the company in the state, then there should undoubtedly be allowed out of the gross earnings the amount necessary to pay for the additions and betterments, or as we term them, further expenses after that operating. This amount must be provided for in some way, or be paid out, and must either come out of the gross earnings, or if not allowed to be taken out in total, then should be some allowance made of the second expenditures for additions and betterments to line, and interest allowed thereon. If as I feel is the correct thing, these expenditures for additions and betterment should be provided for out of the gross earnings and if such allowance is made the rate on the entire capital situated in the state of West Virginia will not be eight or nine per cent., but for the year 1907, the return on the capital of \$21,000,000 it would be 7.12%, and for the year 1908 the gross result is the same on the entire capital invested in the state would be 7.7%. That is the second value, and for the year 1909 the return on the entire capital of \$22,000,000,000 would be 7.12%, this return including all business telegraph and telegraph freight and freight allowable to the state of West Virginia.

Q. 132. Does that figure as yet reflect a telegraph passenger earnings in the state of West Virginia?

A. I should say not.

Q. 133. It is likewise stated in the answer of the defendants that the Bureau in the revenue of the National & Western Railway

Company for the year ending June 30th 1908, was caused by the general depression of business throughout the country and not the enforcement of the two-cent passenger law. Will you please state whether or not this allegation is true?

A. For the year ending June 30th 1907, the intra-state passenger business in West Virginia was 815,506 passengers, 13,025,247 passengers-one-mile, with gross earnings \$362,997.74; for the year ending June 30th 1908, the number of intra-state passengers was 965,223, or an increase of 149,717 passengers, the passengers-one-mile for the year ending June 30th 1908 were 14,995,214, or an increase over 1907 of 1,969,967; the gross earnings for the year ending June 30th 1908 were \$289,943.22; so that whilst the company transported in the year ending June 30th 1908 1,969,967 passengers-one-mile more than in the year ending June 30th 1907, it received therefor \$73,054.52 less than it received in the year ending June 30th 1907. This decrease, whilst partly owing to the decrease in rate, is probably partly attributable to the severe depression in business which we all know existed, beginning in November, 1907.

By Mr. COCKE:

Q. 140. You referred a moment ago to the decrease in the business, does that apply to the intra-state passenger business, the figures of which you have just given, or is the decrease in revenue resulting from that business solely due to the decrease in the rate which was charged?

A. As far as the intra-state passenger business is concerned, the decrease may be attributed entirely to the reduction of the rate from three cents to two cents.

Cross-examination.

By Hon. W. G. CONLEY:

Q. 1. Mr. Cox, does the Norfolk & Western Railway Company issue and sell mileage books over the system?

A. Yes sir.

Q. 2. Good in the state of West Virginia?

A. Yes sir.

Q. 3. At what rate per mile does it sell those mileage books?

A. Two cents per mile.

103 Q. 4. Are the interchangeable mileage books sold by other railroad companies good over the line of the Norfolk & Western in West Virginia?

A. No, sir.

Q. 5. I believe you stated on direct examination that the gross earnings from passengers in West Virginia for the year 1907 were \$362,997.74, was that from passenger fares alone?

A. That was from the transportation of intra-state passengers exclusively.

Q. 6. Then no amount for the revenue to your company from inter-state passengers going from another state into West Virginia

and also going from West Virginia into another state were included in this amount?

A. No sir; that is the amount of intra-state passengers exclusively?

Q. 7. It did not include any revenue from other passenger services, such as expressage, excess baggage, et cetera.

A. It did not.

Q. 8. In the statements you have filed as part of your deposition, are any sources of passenger revenue included other than intra-state revenue?

A. In the answer we made in our bill we confined ourselves to the gross revenue from transportation of intra-state passengers. In the exhibits filed today, however, we also showed the earnings in the intra-state passenger traffic in West Virginia, not only on the passengers transported, but on the proportion of mail and express credited to this. In other words, the exhibits showed two sets of figures, one for the figures in the bill and the other the entire display of the business in West Virginia.

Q. 9. Do the exhibits also include that portion of passengers passing entirely through West Virginia, for which proper allowance should be made to the credit of the state of West Virginia?

A. In the Inter-state gross passenger earnings we include not only the passengers originating in the state and going out, those originating out and coming in, but also those originating beyond and terminating beyond, but passing through the state.

Q. 10. Will you explain more fully how that is set out in the exhibits filed as part of your deposition?

A. In the figures used in the bill we applied, or rather used, the revenue from the transportation of intra-state passengers. We show, however on the exhibit the entire intra-state earnings, which not only include the transportation of passengers, but also the earnings from mail, express and other sundry items, which are properly creditable to the intra-state passenger earnings. Similarly in the inter-state out exhibit shows not only the revenue from the transportation of intra-state passengers, but also and in addition thereto

the earnings from mail, express, union news, et cetera, which are credited to inter-state passenger earnings. These two credits are the accounts accruing from the transportation of mail, express, extra baggage, news privilege, passenger trains furnished the state of West Virginia, automatic weighing machine returns, and miscellaneous collections by our treasurer, which are divisible between inter-state and intra-state on the basis of gross earnings. In other words, we consider that mail, express and news and extra baggage follows the main business of transportation of passengers.

Q. 11. In the bill of complaint in this case you allotted the passenger service in West Virginia for the year ending June 30th 1907, \$1,391,902.31. How did you arrive at that allotment?

A. That was arrived at by taking the entire assessed value of the property in the state of West Virginia at \$31,000,051.45, that amount was allotted to the various classes of business in the proportion of gross earnings. In other words, the gross earnings from

transportation of intra-state passengers for the year ending June 30th 1907 was \$362,997.74, this amount representing the transportation of passengers exclusively, and not including mail, express, etc. This \$362,997.74 represents 4.49% of the entire gross earnings of the state, \$8,090,082.56. This percentage of 4.49 is accordingly applied to the entire capital in the state, of \$31,000,051.45, producing the capital allotted to the transportation of intra-state passengers, or \$1,391,902.31.

106 Q. 12. You stated on direct examination that the cost per dollar to earn the intra-state passenger revenue was slightly over 85½ cents on the dollar, including taxes; and excluding taxes slightly over 82 cents on the dollar. What amount of the entire expenses did you charge to the passenger department in arriving at this conclusion?

A. The entire expenses in the state of West Virginia for the year ending June 30th 1907 of all kinds was \$5,403,767.10, of which \$4,587,238.34 was freight expenses and \$816,528.76 was passenger expenses. These passenger expenses represented a cost of 82.02 cents on the dollar to earn \$993,314.17, and in order to get the expenses on the transportation of intra-state passengers exclusively we assumed that the cost was the same as the cost of earning the entire passenger business in the state. In other words, we did not intend to differentiate between the cost of intra-state and inter-state passenger business.

Q. 13. Do you divide or keep separate the freight expense from the passenger expense?

A. Under our system of accounting we endeavor to separate all expenses as between passenger and freight.

Q. 14. Are part of those expenses what are generally known as common expenses?

A. Some are common expenses, especially maintenance of way, which cannot be distinctly located to either passenger or freight.

Q. 15. For the purposes of this suit on what basis did you
107 divide common expenses?

A. As illustrated in the Maintenance of Way, we have some few items which can be located, such as improvements on buildings and grounds. Outside of that we divide the expenses between passenger and freight on the basis of engine mileage.

Q. 16. Why do you not make it up on the basis of car mileage?

A. We feel that the engine mileage, being you might say, the unit of earnings and expenses, is more appropriate than the separation on the basis of car miles.

Q. 17. Isn't the cost of operating a freight engine when in use greater per engine than the cost of operating a passenger engine?

A. The absolute cost of moving the engine might be more, but the results attained would probably be radically different in the revenue.

Q. 18. Isn't it, as a matter of fact, considerably greater as shown by your records kept of your repair shops, and the cost of coal, etc.?

A. The freight engine, as a rule, is of larger capacity and probably consumes a little more coal, and in fact all of the supplies.

Q. 19. And isn't it also a fact, Mr. Cox, that in the operating part of your railroad through West Virginia that it is very seldom you use what is termed double-headers for passenger trains?

108 A. We have a few, but I think they might be called exceptions.

Q. 20. And isn't it true also that you nearly always use what is known as "double-headers" for freight trains in going up your grades in West Virginia?

A. I presume that the big percentage of our freight traffic is hauled by "double-headers."

Q. 21. Then, does not the engine mileage which you have adopted operate unfairly against the Passenger Department in arriving at some of the figures used in your Exhibits?

A. I should say that as a general proposition the engine mileage was decidedly in favor of the passenger business, and not the freight, in reducing the proportion of general items which may be charged to passenger expenses.

MEMO.—Since making answer to Question 21, an investigation of the comparative percents based on mileage of passenger and freight engines and percents based on mileage of passenger and freight trains demonstrates the fact that the division of undistributed items of expense: i. e., such items as cannot be directly located to passenger or freight on the basis of engine miles, passenger and freight, charges a decidedly less proportion of these undistributed expenses to passenger service than a division on basis of train miles:

Thus in my Exhibit B-2 for 1907 and corresponding exhibits for 1908 and 1909, any items of expense which could not be
109 located to passenger or freight I divided on basis of engine miles, charging to passenger expenses in this way 20% of such general items.

Had I used Train miles as basis of division of General items of expenses, the proportion chargeable to passenger would have been in 1907, 29%, and in 1908 the percentage chargeable to passenger would have been 31%, and in 1909 the percentage chargeable to passenger would have been 31%.

Q. 22. I am speaking specifically as applied to the conditions in West Virginia and the questions involved in this litigation.

A. In West Virginia the probabilities are that the percentage is little different from what it would be on the entire system, because in West Virginia we do have a great many freight trains and they are all double-headers, and the passenger trains, as a rule, are single engine trains, although we do have from time to time double-header passenger trains.

Q. 23. Some of your freight trains have more than two engines?

A. I think not; I am not prepared to say, but I think there is one occasionally.

110 Q. 24. Isn't it a fact, Mr. Cox, that the Norfolk & Western Railway Company and especially that part of it as constructed through West Virginia was constructed, and has been for some time, and is now operated mainly as a freight carrying road,

and that the passenger business is only incidental to the objects of the construction of this road?

A. The freight business, no doubt, is the great bulk of the business, but I would hardly say the passenger business is incidental, because our line through West Virginia is comparatively important. We carry mail and express for the accommodation of the public; our train service is comparatively frequent, and, while the freight business is the great money-making business of it, the passenger business is still an important feature. We have to maintain schedules as long as we run passenger trains, whether anybody rides or not; we can't cut off a train because there is no travel, and taking it all in all, while the results of the passenger business are smaller as compared with freight, it is still in itself an important business.

Q. 25. Will you make up and file a statement as a part of your deposition showing the number of freight engines used, the number of miles made in the aggregate and the cost of operating same in West Virginia, for each year ending June 30th 1907, 1908, 1909 and 1910, and also a separate statement showing the same as to the passenger engines?

111 A. Yes sir.

Q. 26. And will you show on the statement the basis on which the figures are made up?

A. Yes sir, and will mark it Exhibit "J. W. C. No. 1."

Q. 27. Is not the cost of repairs to freight engines per engine much more than the cost of repairs to passenger engines?

A. That is a pretty difficult question to answer. The passenger engine, of course, has got to be kept right up to the top notch, and more frequently repaired than the freight engine. Individual parts or repairs to freight engines might be heavier, but I very seriously question the average repairs put on a freight engine in the course of a year would be any more than a first-class passenger engine, which has to be kept up to the top notch.

Q. 28. Do the items going to make up the item in Exhibit "B. No. 2" termed "Rate of Return Excluding Further Expenses" include Betterments?

A. The rate of return excluding "further expenses" does not include Betterments. I would say that the further expenses and betterments are synonyms—they mean the same thing.

Q. 29. What items are included in the word "Betterments" as used in these statements?

A. It is a class of expenses that whilst not strictly within the limit of operating expenses as prescribed by the Interstate Commerce Commission, is a class of expenses which we feel for the financial soundness of our company should not be capitalized, but should be paid for out of the gross earnings.

112 Q. 30. I notice in the last line at the left of Exhibit "B. No. 2" this statement: "Average Rate per p. o. m. and t. o. m." Will you explain the meaning of that?

A. Rates p. o. m. refer to passengers-one-mile, and t. o. m. refer to tons-one-mile.

Q. 31. In the first column of Exhibit "B No. 2" filed with your

deposition in chief you give the value of bonds and stocks at \$1,952,680.00 allotted as capital employed in earning the intra-state passenger revenue. Will you explain on what basis that valuation is made, whether it is book value, par value, or the market value?

A. The amount \$43,489,533 which appears as the total bond and stock valuation at the extreme right hand of Exhibit "B No. 2" is arrived at by taking the entire issue of capital stock at its par value, \$89,000,000.00, less the amount held in the treasury, \$1,539,700, or \$87,460,300 of capital stock. Total bonds in hands of the public, \$87,852,500 and equipment trust obligations of \$11,900,000, making a total of \$187,212,800, which is amount of capital obligations in hands of public. This is divided on the basis of track mileage, West Virginia mileage being 432.66, mileage of the system 1,862.71; West Virginia percentage 23.23, which applied to the total of \$187,212,800 produces the amount of \$43,489,533, which is the total of the bond and stock valuation as applied to West Virginia. That is subdivided between the various classes of business on plans similar to that adopted with the distribution of the assessed value, that is, on the basis of gross earnings, the 113 intra-state gross transportation earnings being 4.49% of the total earnings of the state are applied to the \$43,489,533 to produce the bond and stock valuation of \$1,952,680 employed in earning \$362,997.74 gross intra-state passenger revenue.

Q. 32. What was the par value of the outstanding common stock issued of the Norfolk & Western Railway Company as of June 30th 1910?

A. The par value of the common stock outstanding June 30th 1910, was \$68,896,000.00.

Q. 33. What was the market value of the common stock on the 30th day of June 1910?

A. The Commercial & Financial Chronicle issue of July 2nd 1910, shows the common stock ranging from 96 to 98 on the 30th day of June, 1910.

Q. 34. What is the par value of the total amount of outstanding preferred stock as of June 30th 1910?

A. The par value of the entire amount of outstanding preferred stock is \$23,000,000.00.

Q. 35. What was the market value as of that date?

A. 87½ bid.

Q. 36. Do any of your bonds sell for less than par?

A. Yes sir.

Q. 37. What class of bonds and what amount sold for less than par, or were valued at less than par, June 30th 1910, and how much below par was that valuation?

A. Reference to the Commercial & Financial Chronicle of issue July 2nd 1910, page 26, shows the sale of the following bonds of the Norfolk and Western Railway Company issue below par:

114 (1) 10-25 Year Convertible 4% Bonds..... 99¼

These bonds are convertible on and after June 1st 1907, but prior to June 1st 1917, at option of holder, into paid-up shares of the same par value of the Common Stock of the Company.

(2) Other issues were quoted below par with no sales: First Consolidated Mortgage 4% Bonds—Bid 98; These bonds are a first lien on about 898 miles of railroad:

Norfolk Terminal Division.....	6.30 miles
Clinch Valley Division.....	123.37 miles
Lynchburg & Durham Division.....	117.58 miles
Roanoke and Southern Division.....	121.50 miles
Maryland and Washington Division.....	244.16 miles
Ohio Extension.....	256.37 miles
North Carolina Extensions.....	28.30 miles

and subject to previous mortgages are a lien upon 776 miles of additional railroad:

(3) Divisional First Lien & General Mortgage 4% bonds, Bid 90¼; These bonds are a first lien on Cincinnati Division, Portsmouth, O., to Idlewild, O., aggregating...	131.69 miles
Big Sandy Low Grade Line, Naugatuck to Kenova..	59.15 miles
Dry Fork Branch.....	29.43 miles

and upon such equipment, extensions and branches as may be acquired or constructed out of proceeds of the new bonds; subject to First Consolidated Mortgage they are a lien upon the properties covered by the latter.

115 (4) Scioto Valley & New England R. R. Co. First Mortgage 4% Gold Bonds, Bid 94.

These bonds are a first lien upon 128.6 miles of road extending from Columbus, O., to Coal Grove, O. We have no means of determining the total sales of Bonds June 30th 1910.

Q. 38. Has there not been a considerable amount of the money realized from the sale of bonds and capital stock, common and preferred, invested in property other than that used in connection with the railroad company proper?

A. No sir.

Q. 39. To what extent does—what is the ordinary cost of outside property treated by you and your company as property used in connection with the railroad proper? In other words, are the moneys you have invested in coal company stock, or coal company bonds, or in hotels or real estate, not used directly in the operation of the railroad, treated as railroad proper?

A. I should say as far as the Norfolk & Western Railway is concerned, we have very little of any such investments. Of course, if there are any, the income from such investment enters into the income of the railway, and any such items are treated on the exhibits filed today, but the amount we have invested is very small.

Q. 40. Such income would not be treated in the exhibits filed today in connection with the operation of the passenger department of the railway company, would it?

A. If there were any miscellaneous earnings on outside of opera-

116 tions, the earnings would be credited to the Norfolk and Western Railway Income Account, and we show on our exhibits in several places where our earnings from transportation of passengers are increased by this miscellaneous income.

Q. 41. Isn't it a fact that the most of such investments such as warehouses, et cetera, are on the other side of the ledger, so far as income is concerned?

A. Some show a debit, and some show a credit, but where we may have such investments that are on the wrong side that probably represented properties that are used in the interest of the passenger business, such as Dining Cars for the accommodation of the traveling public.

Q. 42. Didn't your company assume in some manner the purchase of a large amount of the bond and stock indebtedness of the Pocahontas Coal Company?

A. The Norfolk & Western Railway Company had a certain amount of money invested in the stock of the Pocahontas Coal & Coke Company, but it is not a large amount. The indebtedness of the Pocahontas Coal & Coke Company is represented by a bonded indebtedness of its own, what we call a purchase mortgage bond, and the money the railway company has invested in the stock is just enough to control the company.

Q. 43. Didn't the railroad company also invest in the bonds issued by the Pocahontas Coal & Coke Company?

A. They may have one or two that they bought on the market recently, but no system of investment was made in it. I think we hold today probably one or two bonds bought to be later
117 on turned into the Sinking Fund of the Coal Company, and the railway company then reimbursed.

Q. 44. What amount of money realized from the sale of the Norfolk & Western bond issues, and the Railway Company stock issues have been invested in coal or timber lands, or coal companies, or other properties not otherwise used directly in connection with the operation of the railway property?

A. As I recall, our investment in the stock of the Pocahontas Coal & Coke Co. is \$501,000. That is simply giving us the control of the stock. We have no interest whatever in the bonds of that company except one or two bonds recently purchased to go into the Sinking Fund.

Q. 45. Did you have investments in any other coal lands, either in West Virginia, or elsewhere in the United States?

A. We have no investment in any outside properties, being particularly free from any such investments.

Q. 46. Ought not the amount of money you have invested in the coal company be deducted from this capitalization in ascertaining the rate of income you would be entitled to for the purposes of this litigation?

A. No sir; I should say not because it is simply an investment in the stock of that company as the means of securing tonnage to the railway company, and it is just like the investment we hold today in the Old Dominion Steamship Company. We hold quite a

large interest in it, and the dividends on that stock enters our income account and goes to the credit of our general Profit & Loss account.

118 Q. 47. What is the income on that stock?

A. I would say, in round numbers, \$12,600.00 a year.

Q. 48. What is the amount of the rate?

A. The Old Dominion Steamship Co. pays 6% annual dividend.

Q. 49. Is that paid out of the earnings?

A. Yes sir; out of the earnings of the Old Dominion Steamship Co., and that goes into our Income Account the same as Bank Interest, or any other credit.

Q. 50. How much do you have invested in that company, or did you have, as of the 30th day of June, 1910?

A. We hold of the Old Dominion Steamship Company 2,100 shares, an investment of \$210,000.00; dividend at 6% would be \$12,600.00.

Q. 51. Were there any common stock or preferred stock given away to the purchasers of your bonds?

A. Not under the reorganization. There may have been some under the old railroad company, but under the reorganization of the railroad company, there was no stock given as a bonus.

Q. 52. At any time since 1896?

A. 1896. You understand, of course, there was stock given in exchange for other funded securities, but not as a bonus.

Q. 53. At the close of your examination in chief, Mr. Coxé you spoke of the decrease of passenger revenues for the year ending June 30th, 1908, and attributed it, as I understand you, wholly to the operation of the two-cent passenger rate then in force in

119 West Virginia; is it not a fact that the freight revenues decreased during this year in a greater proportion than the passenger revenues decreased?

A. For the year ending June 30th 1907 our intra-state passenger earnings in West Virginia were \$362,997.74. Our gross revenue from intra-state freight transportation was \$214,935.09. For the year ending June 30th 1908 our intra-state passenger revenue in West Virginia was \$289,943.22, whilst our revenue from intra-state freight transportation was \$192,469, or a loss on the intra-state passenger business of \$73,054.52; while our loss on the intra-state freight was, in round numbers, \$22,000.00, so that the loss in the transportation of intra-state passenger business is considerably more than the corresponding loss on intra-state freight business.

Q. 54. Was that loss in intra-state freight business occasioned by the decrease in the rate charged, or by the falling off of the business?

A. I should say by the general falling off of business; I can't recall any change in the freight rate situation.

Q. 55. Isn't it a fact that the general financial condition of the country during the greater portion of the year 1908 and part of the year 1909 was the cause of a great falling off of railroad business generally, including both freight and passenger?

A. There is no doubt that the financial depression which over-

120 took the country in the Fall of 1907, and which began to show its effect on the Norfolk & Western Railway earnings in November of that year, caused a decided falling off in our business, but the year 1908 shows on the entire Norfolk & Western System gross earnings to the extent of \$28,962,217.15; while the year ending June 30th 1909, was \$29,327,101.66, or an increase of about \$365,000.00 on the entire system, so that the depression was confined to the Fall of 1907 and a considerable portion of 1908.

Q. 56. From your general knowledge of the railroad business and the condition of other railroads, wasn't that the experience of the other railroads?

A. The period of depression was general all over the country.

Q. 57. And affected the sources of revenue from both freight and passenger?

A. No doubt it had some effect on both classes of business.

Q. 58. In your direct examination you gave, as I now recall, the gross passenger revenue per mile for intra-state West Virginia passenger business for the years 1907 1908 and 1909. Will you give the gross passenger revenues per mile for those years, including the year 1910, including with the intra-state passenger business all other sources of passenger revenue, as well as the inter-state passenger revenue, to which West Va. is entitled?

A. I will have to furnish this information, and will mark it Exhibit "J. W. C. No. 2."

121 Q. 59. Do you compete with other railroads in West Virginia on intra-state passenger business?

A. I can't recall any competition on the intra-state business in West Virginia. We have so few connections there, I don't think we could be said to compete with any of them on intra-state business.

Q. 60. Do you compete with other railroads on inter-state passenger business?

A. We have a certain amount of competition with the Chesapeake & Ohio Railway Company.

Q. 61. Are your rates from those competing points less than the average rate of your passenger business of the entire system?

A. Are they less than the entire system?

Q. 62. Than the average rate of the entire system.

A. That is purely a guess; I should say not.

Q. 63. What is your average passenger rate per passenger per mile for inter-state business on the entire system for the years 1907, 1908, 1909, and 1910?

A. The average rate per passenger per mile on inter-state passenger traffic for the entire Norfolk & Western System is:

For years ending June 30th, 1907, 2.402 cents.

For year ending June 30th, 1908, 2.037 cents.

For year ending June 30th, 1909, 2.229 cents.

For year ending June 30th, 1910, 2.218 cents.

122 Q. 64. You also spoke on your direct examination about the country being sparsely settled in West Virginia through which the Norfolk & Western Railway passes. Isn't it true

that your passenger trains are nearly always crowded on that portion of the railroad?

A. They may be crowded in certain limits; in fact, we find it necessary on some of them which run with frequent stops, and which adds to the expense of the business, to put extra men on trains to collect tickets, but that business is confined to a small space, and taking the entire line, I would say the average is not crowded, but taking the trains in the immediate coal regions they are so well filled that we have to put on extra men to take up tickets, that that is on account of the short space between the stop, to accommodate the public, and that congestion is limited to a certain area. It would not apply to the entire line in West Virginia.

Q. 65. Between what towns does that crowded condition exist?

A. I should say trains running between Bluefield and Welch, and probably trains running each way out of Williamson.

Q. 66. How far is it from Bluefield to Williamson?

A. The distance from Bluefield to Williamson is 106.51 miles, of which 100.77 miles are in West Virginia, 5.45 miles are in Virginia, and .29 miles are in Kentucky.

Q. 67. What proportion do these miles bear to the entire main line mileage in West Virginia, from Kenova to Bluefield?

123 A. The West Virginia Mileage, Bluefield to Williamson, is 100.77, Williamson to Naugatuck 14.8, Naugatuck to Kenova via Low Grade Line, 59.1, Naugatuck to Kenova via 12-Pole Line, 83.5, making 258.17. The distance from Bluefield to Williamson in West Virginia, 100.77, therefore, represents 39% of the West Virginia Main Line Mileage between Kenova and Bluefield, 258.17 miles. Separate and distinct Passenger service being maintained for the accommodation of the public on both the Low Grade Line between Naugatuck and Kenova and on the original "12-Pole" Line between Naugatuck and Kenova via Dunlow.

Q. 68. How much, if any, of the income from operations was used to pay bonds that fell due during the years ending June 30th 1907, 1908, 1909 and 1910?

A. I will say that no bonds were paid off during any of the years in question. We had, however, some Equipment Trust Certificates, for equipment purchased under Trust Agreements, which matured during these years, and which were charged to Income, as follows:

	Total payments.	Chg. income.
Year ending June 30th 1907.....	\$1,500,000	
For which there was appropriated from		
Income in that year.....		\$996,652.06
In 1908 we paid off Certificates aggregating	\$1,600,000	
Of which there was charged to Income..		471,203.46
In 1909 there was paid off Certificates aggregating	\$1,600,000	

124	Of which there was charged to Income	672,252.74
	And in 1910 Certificates were paid aggregating	\$1,600,000
	Of which there was charged to Income ..	<u>\$1,000,000.00</u>
	Total Trust Certificates paid and charged to income in the years 1907, 1908, 1909, and 1910	<u>\$3,140,108.26</u>

I would state, however, that none of the items of Equipment Trust Certificates paid in 1907, 1908 and 1909, and charged to Income, to-wit:

The amounts, \$996,632.06
471,203.46
672,252.74

are included in the amounts shown in Exhibits B-2, C-2, and D-2 under the heading "Deduction for Further Expenses or Betterments" as filed in this case. The amounts representing "Deductions for Further Expenses" as appearing in Exhibit B-2 for year ending June 30th, 1907, Exhibit C-2 for year ending June 30th 1908, and Exhibit D-2 for the year ending June 30th, 1909, are expenditures for "Road" Betterments, and do not include any Equipment.

Q. 69. Has the Norfolk & Western Railway Company for the four years just mentioned, (1907, 1908, 1909 and 1910) paid out of its income from operations of the railroad any amount for interest on its investments in coal companies, steamship companies, or other companies?

A. I think I may say not. I will, however, qualify that, because I believe I know what you are trying to bring out. We have not paid any interest on our investments, but the Norfolk &

125 Western Railway Company does guarantee the interest on the bonds of the Pocahontas Coal & Coke Company, which is purely a Coal Land owning company, and not a mining company or shipping company. The Pocahontas Coal & Coke Company leases its lands to miners of coal and receives a royalty thereon, and if these royalties fail to meet the interest on its bonds, the Norfolk & Western Railway Company agrees to make good the deficit. In this way it advanced in

1907,	\$218,000.00
1908,	192,000.00
1909,	150,000.00
1910,	138,000.00

Q. 70. You stated also on direct examination, as I now recall, that this year, June 30th 1910, the company declared a dividend on preferred stock of four percent, on common stock five percent. Will you state what amount in addition to that was set aside as surplus, and were all the fixed charges, these dividends and the amount set aside as surplus, paid out of the operating expenses of the railroad company?

A. For the year ending June 30th 1910?

Q. 71. Yes, sir.

A. The net income from operation for the year ending June 30th, 1904, was \$9,043,345.35. This did not include in the operating expenses any form of additions or betterments, the operating expenses being restricted to the actual operations and repairs.

124 From this net income of \$9,043,345.35 there was allowed expenditures to maintain the earning power, and to offset deficiencies \$3,573,598.32. The balance was \$5,469,747.03, from which was deducted payments to the Puget Sound Coal & Coke Co. on account of deficiency of Shilling Fund and interest on Puget Sound joint bonds of \$334,000; cash dividends on stock, preferred 5%, and common 5%; the preferred dividend being \$100,000, and the common stock dividend being \$1,250,000.00, or a total of \$1,350,000.00 leaving the amount carried to Profit & Loss for the year \$4,119,747.03, from which was deducted the income and commission of securities sold of \$21,875.00.

Q. 72. Isn't it true that the Norfolk & Western Railway Co. earned during the year ending June 30th, 1903 about 12% on its capital stock and bonded indebtedness, after the payment of operating expenses and fixed charges?

A. No, sir.

Q. 73. What did it earn?

A. The net income, after providing for additions and betterments for the year ending June 30th, 1903, was \$7,400,000.00. From that I deduct the 5% dividend on the preferred stock of \$100,000, and the balance is \$7,300,000.00. The capital common stock outstanding is, in round numbers, \$18,000,000.00 which receives on this basis a return of 4.05%, which, however does not provide for the deficit of earnings to meet interest on Norfolk & Western Puget Sound joint bonds, and taking both preferred and common stock the average rate of return is 5.05%, which also fails to provide for deficit of earnings to meet interest on Norfolk & Western Puget Sound joint bonds.

127 Q. 74. If you include in the net earnings of the railway company all money spent for the purchase of additional equipment, the operation of its line and all other improvements, what percent would it pay?

A. I would say that we did not include in our additions and betterments any new line, or any actual additions to the property, the \$3,573,598.32 being for "Road" improvements, and the payment of the principal of equipment cost, which we felt was necessary to maintain the book value of our equipment. Taking the net income of \$9,043,345.35, and deducting therefrom the deficiency of interest on Norfolk & Western Puget Sound joint bonds of \$134,000, we have left as available \$9,043,345.35, which yields a return on the capital stock outstanding of 5.05%, but which makes no provision for the expenditure of \$3,573,598.32, which our management felt to be a proper charge against the gross earnings of the company. These expenditures being made to maintain the earning power of the property, and which should not properly be capitalized.

Q. 75. Is your report to the Board of Public Works for the year

It is not customary in working up statistics of Intra-state passenger traffic such as passengers, passengers-one-mile and Revenue, 130 to keep separate the passengers carried on the various forms and varieties of tickets, so that whilst we have the total results for these two years, we have not the detail as asked for by the Attorney General, and to answer his inquiry would necessitate our again going over the detail of conductors' reports, which as above stated is not now available for the entire year ended June 30th 1907, and for that portion of the year ended June 30th 1909, from July 1st 1908, to February 1909.

Counsel for the defendants reserves the right to further cross examine the witness after the defendants have had time to examine the exhibits already filed by the witness and analyze them.

Redirect examination.

By Mr. REATH:

Q. 1. Mr. Cox, you have described in your cross examination the general effect of the depression which began in the autumn of 1907, as affecting the company's revenues generally. Please state what was the West Virginia intra-state passenger business of the Norfolk & Western Railway in 1907, and whether the volume of the business decreased in 1908 and subsequent years?

A. Whilst the volume of the West Virginia intra-state passenger business increased in 1908 over 1907, the revenue derived 131 therefrom was materially less, owing to the reduction of the rate from three cents to two cents.

	Passengers.	Passengers-one-mile.	Revenue.
Year ending June 30, 1908...	935,223	14,995,214	\$289,943.22
Year ending June 30, 1907...	815,506	13,925,247	362,997.74
1908 excess	119,717	1,069,967	
1908 Deficit			73,054.52

Q. 2. What about 1909, as compared with 1908?

A. The comparison of West Virginia intra-state passenger one-mile for the years ending June 30th 1909 and 1908, and the revenue thereon was:

	West Va. passengers-one-mile.	Revenue.
1909	14,592,121	\$281,864.50
1908	14,995,214	289,943.22
Decrease in 1909	402,593	8,078.72

Q. 3. Now, comparing 1909 with 1907, was 1909 greater in volume or less?

A. The comparison of West Virginia Intra-state passengers traffic for the year ending June 30th 1909 as compared with 1907 was:

	West Va. intra-state passengers- one-mile.	Revenue.
1909	14,592,621	\$281,864.50
1907	13,025,247	362,997.74
1909 Increase over 1907	1,567,374	
1909 Loss of Revenue		\$81,133.24

That is whilst we carried 1,567,374 more passengers-one-mile in 1909 than in 1907 we received in 1909 \$81,133.24 less revenue.

At 6:10 P. M. the taking of this deposition was adjourned until 30th day of January, 1913, at Roanoke, Va.

STATE OF VIRGINIA,

City of Roanoke, To wit:

I, Carl B. Short, a Notary Public for the State and city aforesaid, do hereby certify that the foregoing deposition of Jos. W. Coxé was duly taken by me at the time and place and for the purpose mentioned in the caption hereto.

Given under my hand and notarial seal this 8th day of February, 1913.

CARL B. SHORT,

Notary Public. [SEAL.]

My term of office expired on the 7th day of Oct. 1912.

By the laws of Virginia no tax is required upon this seal.

133 Office of General Attorney, Norfolk & Western Railway Co.,
General Office Building, Norfolk & Western Railway,
Roanoke, Va.

THURSDAY, January 30, 1913—11 a. m.

By agreement of counsel the taking of depositions in the case of Norfolk & Western Railway Company v. Wm. G. Conley, et als., was resumed at above time and place for the purpose of further cross-examination of witness Joseph W. Coxé by the Attorney General of West Virginia.

Present:

Lucian H. Cocke, Esq., Attorney for Complainant, and Wm. G. Conley, Esq., Attorney General of the State of West Virginia, for Defendant.

Jos. W. COXE, a witness heretofore introduced and examined on behalf of the Complainant, appearing for further cross-examination by defendant.

By Mr. CONLEY:

X Q. 1. Mr. Coxe, will you please state how you calculate the intrastate earnings of \$362,997.24 for the year ending June 30, 1907, as shown on page 6 of your original, testimony?

A. The gross revenue from the transportation of West Virginia intrastate passengers for the year ending June 30, 1907, was \$362,997.24. That is the revenue derived from passengers exclusively, and is worked up from the ticket reports, cash fare reports, and the interline reports from foreign companies.

X Q. 2. Do you mean that those figures are actual figures?

A. Yes, we claim these to be actual figures from the transportation of intrastate passengers.

X Q. 3. And do not include any earnings from excess baggage or express or any other income in the way of passenger revenues?

A. No, I should say not. I will say in that respect that my recollection is in working up the data from our records for the original bill, upon which this litigation was started, that was all the information we were asked for by our Legal Department; but when we worked up our exhibits we did add earnings from mail, express and the news privilege, and all of the different items of passenger train earnings.

X Q. 4. In what exhibit is that shown?

A. That will appear in Exhibit B-2.

X Q. 5. Again referring to page 6 of your original deposition, answer to direct question 21, will you please state how you determined the proportion of gross earnings of \$8,090,082.56 attributed to West Virginia for the year ending June 30, 1907?

135 A. That amount of \$8,090,082.56 represents the gross earnings from passenger and freight, intrastate and interstate, West Virginia. The amount is made up of passenger business inter and intrastate and freight business inter and intrastate. I would say in a general way as far as the freight is concerned that from our records we prepare at the end of each month what we term abstracts showing the point from and the point to of all freight movement. We subsequently analyze that by state lines so as to get the earnings in each state. Similarly with the passenger business, from our reports of ticket sales, cash fare reports, etc., we prepare abstracts of the passenger business, getting first the grand total and then prorating it to get the earnings by states. To these abstracts of passenger business proper, and freight business proper, we add our various miscellaneous earnings from other sources, in the way of excess baggage, mail, express, news privileges, and the other various items of passenger earnings of a sundry character, what we term byproducts; and similarly with the freight, adding to the earnings from the actual movement of freight the miscellaneous earnings, and in that way get the aggregate total of \$8,090,082.56.

I think I may safely say that that is an actual, or a closely actual statement of the gross earnings.

X Q. 6. I suppose you use the same method in all of the subsequent fiscal years?

A. Yes sir; the same general formula as far as I can recall was followed in each subsequent year, it having been our practice
136 for some years past to have made up statements of earnings from passenger and freight by States.

X Q. 7. Referring to page 7 of your original deposition please tell me how you arrive at the figures \$31,000,051.45, in answer to question 23, showing the capital employed in the State of West Virginia?

A. That, as I recall it, was the assessed value of the property for taxation purposes as established by the Board of Public Works of West Va.

X Q. 8. Please refer to page 33 of your original testimony and see if the valuation for 1908 of \$31,000,000 was arrived at in the same manner; and also refer to page 34 of your original testimony and see if the valuation of \$32,000,000 was arrived at in the same manner.

A. The amount of \$32,000,000 used in Exhibit D-2 for the year June 30th 1909 is also the value of the property as assessed for taxation by the Board of Public Works of the State of West Virginia. As regards the amount, \$31,000,000 which appears on Exhibit C-2 for the year ending, June 30th 1908, that is the value of the property as assessed for taxation by the Board of Public Works of West Virginia.

X Q. 9. Do these figures or do they not represent the true value of the property of the Norfolk & Western Ry. Co. in West Virginia?

A. They represent the assessed value as made by the Board of Public Works. I am under the impression that in arriving at that assessment the Board of Public Works figures that the amount
assessed represents about 80% of what they consider the
137 actual valuation based upon their methods of assessment.

X Q. 10. What is your opinion as to the \$31,000,000 for the year 1908 and the \$32,000,000 for the year 1909 as representing the true value of the property of the Norfolk & Western Ry. Co. in West Virginia.

A. I do not know hardly how to answer that question, General. As I say, they are the values which the Board of Public Works of West Virginia put upon our property for the years stated; and, as I say, under their plan I have always understood that they assessed what they considered was 80% of the true value, their idea being to allow for emergencies in case of sale, and to adopt a liberal position in dealing with the tax situation.

X Q. 11. At the bottom of page 7 of your original deposition you state that it took 85.40¢ to earn every intrastate passenger dollar in the year ending June 30th 1907; and on page 29 of your original deposition, in answer to question 76, you state that it cost 95 cents to earn every intrastate passenger dollar for the year 1908; and on

page 35, in answer to question 95, you state that it cost 97.06¢ not including taxes to earn every intrastate passenger dollar for the year 1909. Are these costs in each case the average of all passenger business.

A. I would say for the purpose of these exhibits, and I will now particularly mention exhibit D-2 for the year June 30, 1907 that where I show ordinary operating expenses as representing a certain percentage of gross earnings I have assumed that the cost of earning a dollar was the same on all classes of passenger business.

138 X Q. 12. Are the percentages quoted by you computed correctly?

A. I show for the year ending June 30, 1907, that the percentage of ordinary operating expenses to earnings is 82.20%, and the percentage of ordinary operating expenses and taxes to earnings is 85.40%. For the year ending June 30, 1908 I show percentage of intrastate passenger expenses to earnings are 95%; and for the year ended June 30, 1909, as per Exhibit D-2, that the percentage of intrastate passenger expenses to earnings is 100.55%. The by-products in each case being included in the earnings.

X Q. 13. Including taxes?

A. Yes, sir.

X Q. 14. I believe you also stated that the cost of doing intrastate passenger business is in excess of the cost of doing all business, did you not?

A. The cost of doing intrastate business?

X Q. 15. The cost of doing intrastate passenger business, yes.

A. Yes, it is in excess of the cost of doing all passenger business. I would say as a general proposition that that was the case; that I believe it to be a fact that the intrastate passenger business is conducted at a higher cost than the interstate passenger business.

X Q. 16. How much higher?

A. That I have never figured, but in this proposition I simply assume that the cost of earning a dollar was the same in either case, that is, both in Interstate and Intrastate passenger business.

139 X Q. 17. Why do you assume that the cost is the same?

A. In working up these exhibits I was first under the impression that the only feature that would be considered in this investigation would be intrastate passenger business. That as I recall was the proposition put up to me by the Legal Department, to furnish them figures showing what I considered the result. I might have confined my exhibit right to that particular feature, because I think that was all that Mr. Reath asked for, but in order to get that I had to determine the passenger expenses in the State, and the intrastate portion of it. In debating the matter in my mind, and in order to be on the safe side to present the best possible phase on behalf of the State as against the Railway Company, I assumed that the cost of earning a dollar was the same on either class of business. Had I at the time been figuring on the freight and felt that the freight would come in with the passenger I would very likely have arranged my exhibits so as to show "a load" on the cost of intrastate freight, but as far as the passenger business was

concerned I did not feel as clear on that as I did on the freight. But, as far as the exhibits are concerned, all of the information other than the intrastate columns, you might say, was in one sense, gratuitous but merely worked out to show the entire situation in the State. The issue I had immediately in mind was the Intrastate Passenger Business. In making up these exhibits I felt that I would be thoroughly safe in preparing figures in which I assumed that the cost of earning a dollar was the same for intrastate as for interstate passenger business.

140 X Q. 18. Mr. Coxe, have you made an estimate or an examination as to the cost of doing intrastate freight business in West Virginia as compared with the cost of doing interstate freight business?

A. No sir I cannot say that I have.

X Q. 19. On what basis are your exhibits made up in relation to the freight business?

A. The freight was worked up on the same plan, assuming that the cost of earning a dollar would be the same in either case, intrastate or interstate, on the freight business.

X Q. 20. Was that assumption made regardless of any earnings on the part of the freight?

A. I think I may say that that distribution was practically based upon the respective earnings and the division of expenses between intrastate and interstate. In working up these exhibits my idea though was more on the cost of earning a dollar; that was running in my mind, but it practically amounts to the same thing; that I have divided the freight expenses between interstate and intrastate on the basis of the respective earnings.

X Q. 21. These exhibits then were made up regardless of whether the rate by which a dollar was earned was high or low?

A. The great predominating freight business shown on these exhibits is the interstate business, the earnings for the year 1909 being \$6,809,000.00 as compared with \$164,000.00, intrastate freight earnings, and the division of expenses as between the two classes of business was based upon the respective proportions
141 which each class of earnings bore to the total amount of earnings.

X Q. 22. Does that mean that the actual rate per ton per mile for freight was not considered?

A. The actual rate per ton per mile for hauling it—do you mean the cost of hauling it?

X Q. 23. Yes.

A. No sir; that was not considered in making the calculation.

X Q. 24. Is not the operating per cent the relation between earnings and expenses?

A. How is that?

X Q. 25. Is not the operating per cent the relation between the earnings and the expenses?

A. Yes, sir; if you have a certain amount of gross earnings and a certain amount of operating expenses, and divide your earnings

into your expenses, you have what is represented as the cost of earning a dollar of that business.

X Q. 26. In making up your exhibits then you have considered only one side of the question, that is, the earnings, have you not?

A. I have the earnings and the total expenses, both. I know what my gross earnings are on freight, and I feel reasonably sure that my freight expenses are correct in total. The question is simply a sub-division of that expense between intrastate and interstate.

X Q. 27. Are you as certain of the cost, that is, of your expenses, as you are of your earnings?

142 A. I would say as far as the total freight and passenger expenses are concerned that there would not be the same feeling of absolute reliance that there would be in the case of the earnings, because we worked the freight and passenger earnings up from positive sources, whereas with expenses there are questions as to division between passenger and freight which do not accrue in the case of earnings. As far as the total earnings are concerned we are satisfied as to their accuracy.

X Q. 28. Do you know then how much more it costs per ton per mile to do intrastate freight business than to do interstate freight business?

A. As a general proposition, from what I know of the character of the freight traffic in West Virginia, I would say that the larger percentage of the intrastate business being interchanged with branch lines, and the larger percentage of it being less than carload, that the cost of handling intrastate business would be materially greater than the cost of handling interstate business.

X Q. 29. Please give me how much greater would be the cost of doing intrastate than interstate business, either in percentage or some ratio?

A. Well, I may say ten times greater.

X Q. 30. On what figures, if any, do you base that statement?

A. Well, simply from a general knowledge of the business, and from what I realize, based on experience in matter, is the
143 additional expense in labor involved in handling intrastate business on the Norfolk & Western Ry. that would not prevail in the case of homogeneous interstate business that we handle.

X Q. 31. Did you ever make an actual calculation of the relative costs?

A. No sir; not that I recall.

X Q. 32. What percentage of intrastate freight business is less than car load?

A. Excluding coal and coke I can give you the percentage of intrastate business.

X Q. 33. Less than car load?

A. Yes. Car load represents 14%; and I would add that that is based upon the tonnage handled in the month of May 1910.

X Q. 34. How about the percentage of interstate freight less than car load?

A. The percentage of interstate freight less than car load is 2%.

That is, on the line between Bluefield and Williamson for the month of May 1910.

Mr. COCKE: Does that apply solely to merchandise?

WITNESS: That applies solely to merchandise.

X Q. 35. What is the difference between the Interstate freight rate per ton per mile and the intrastate freight per ton per mile in West Virginia?

A. Do you mean the tariff rate or the rate for transportation?

144 X Q. 36. I mean, the actual rate that you charge and collect as shown by the receipts per ton per mile.

A. The receipts per ton per mile would be materially greater on intrastate than it would be on interstate business.

X Q. 37. How much greater?

A. The average rate of revenue per ton per mile for the year ended June 30, 1907, on intrastate freight was 2.88¢, and on interstate freight it was .51¢.

X Q. 38. On what class of freight?

A. That is the average of all freight, intrastate and interstate respectively.

X Q. 39. How many times greater then was the intrastate freight charge than the interstate freight charge, per ton per mile?

A. In round numbers it would be 5.65 times greater in the case of intrastate freight than interstate freight.

X Q. 40. Can you state the freight rate per ton per mile that you charge for ordinary freight, such as merchandise and the local freight usually handled?

A. I could not off-hand. I could look it up.

X Q. 41. Have you a classification here that you could look at and answer now?

A. I do not know that I am sufficiently familiar with the tariff rates to read them off offhand. I have a memorandum here that I made up some time ago, in which I have some average rates per ton per mile.

145 X Q. 42. Is that West Virginia intrastate?

A. Yes, in West Virginia the intrastate freight rate, on ice, for instance, is 3½ cents per ton per mile on 20 mile haul.

X Q. 43. Do you know what is the maximum local rate that you can charge for that sort of freight in West Virginia?

A. I do not. That is a matter that would rest with the Traffic Department. I presume they are familiar with that matter.

X Q. 44. Well, will you file an exhibit as a part of your testimony showing the intrastate freight rates per ton per mile for the different classes of freight hauled over the N. & W. Ry. in West Virginia, and showing separately the freight rate per ton per mile for coal, coke and lumber?

A. As I understand it in West Virginia, there are different blocks of distances.

X Q. 45. Yes, ten miles is the basis I will say. I wish you would furnish me this information as provided by serial section 2493 of

the Code of West Virginia of 1906, and as to classification, see the Acts of the Legislature of West Virginia of 1895, chapter 17.

A. I will endeavor to furnish such data.

X Q. 46. Mr. Coxe, you stated that on an average the intrastate West Virginia freight rate over the interstate West Virginia freight rate was about 5.7 times greater. To what year did these figures relate?

A. To the year ended June 30th 1907.

X Q. 47. How much greater is the intrastate freight rate for the — ending June 30, 1910?

146 A. The average rate per ton per mile intrastate freight for the year ended June 30, 1910, was 3.27¢, and on interstate freight .45 cents.

X Q. 48. What per cent does that represent?

A. 7.3 times, greater for intrastate freight.

X Q. 49. Have you at hand the percentages for the year ended June 30, 1911, and for the year ended June 30, 1912?

A. No, sir; I have not.

X Q. 50. How did you assign the cost of passenger transportation,—enginemen, trainmen, and fuel,—in the cost as shown in your exhibit? Were they assigned to each operating division on actual figures, or what method did you pursue?

A. The cost of enginemen would be divided by each operating district.

X Q. 51. What about trainmen?

A. The cost of trainmen would be applied in the same way. They have different runs on different districts, and it would be charged in that respective district.

X Q. 52. How about fuel?

A. Fuel would be based on the consumption on each operating division.

X Q. 53. How are the men paid; on a mileage basis?

A. The engineers?

X Q. 54. Yes, and trainmen.

A. They are paid as a general proposition on the—I cannot say exactly the mileage basis but it is on schedule rates agreed upon with the management. In some cases it may be on a day rate, and again on a mileage rate as you state.

147 X Q. 55. And they are usually based as nearly as possible on hundred mile runs, are they not?

A. I would say as a general proposition that they are based on a minimum of 100 miles.

X Q. 56. Then the expense follows in a general way the train mileage or the engine mileage?

A. I should say that was the case as a general proposition.

Q. That is, for these particular expenses enumerated in my former question?

A. That is, the wages of train crews?

X Q. 57. Yes.

A. Yes.

X Q. 58. How about the fuel charged?

A. The fuel would be charged to the district where consumed.

X Q. 59. Would it not more nearly follow the car mileage than the engine mileage?

A. I cannot say that it would, no sir.

X Q. 60. Doesn't it take as much fuel for a short train as it does for a long train?

A. No, as a general proposition a train of equal lading would consume less fuel on a 50-mile run than it would on a 100-mile run.

X Q. 61. Then, while the weight has something to do with that factor of it you think it more nearly follows the engine mileage rather than the car mileage, for fuel I mean?

A. I do not know as I fully get the import of your question, but the coal would undoubtedly vary with the mileage of the engine. If there were more engine mileage there would be more coal consumed as a general proposition.

X Q. 62. Mr. Coxe, did you not in making up your expense account filed with your exhibits use in them car mileage as the basis?

A. No sir.

X Q. 63. You did not?

A. The only feature where car mileage would come in would be to divide geographically—where we have distributed certain general expenses that were not allocated, such as salaries of officers, on the basis of car miles geographically.

X Q. 64. Mr. Coxe, on page 17 of your original testimony, or, I mean your direct examination, in answer to question 46, you say that you divide each division between the States where they overlap on the basis of the mileage of track in each State.

A. Yes, sir.

X Q. 65. Did you use that method as to all of the exhibits filed with your deposition? You were then particularly speaking of Exhibit A.

A. Yes, I should say that would be correct. I had not noticed before that I have used the term "miles of track" whereas the basis was miles of road. Probably used that term inadvertently. I see that my answer reads "that is sub-divided between the States through which that division runs on the basis of mileage of track in each State." I should have said, on the basis of miles of road in each State.

149 X Q. 66. What per cent of freight car miles from Williamson to Kenova would be shown when compared with the total of the Kenova Division, which Kenova division extends from E. Williamson to Portsmouth, Ohio, as I understand it, using the year ended June 30th, 1910.

A. That can be answered but not on the spot here.

X Q. 67. Will you take these figures that I give you now subject to verification: For the year 1910 freight car miles E. Williamson to Kenova, in West Virginia, 51,103,084, and from Kenova to Portsmouth, Ohio, 21,124,546; West Virginia percentage 70.75%.

A. The percentage of freight car miles on the line E. Williamson to Kenova is 70.75% of the total car mileage E. Williamson to Portsmouth, according to my computation, these figures being submitted by Mr. Hillman subject to verification by the records of the Car Record Office of our Company.

X Q. 68. You are at liberty to put in the record the proper figures if you should find these incorrect.

A. I have no doubt these are correct, but would like to confirm them.

X Q. 69. Will you do the same as to the passenger car mileage for the same division, taking the following figures for verification: E. Williamson to Kenova 988,055, Kenova to Portsmouth 574,258, total 1,562,311; percentage of division in West Virginia 63.243%.

A. The passenger car miles E. Williamson to Kenova as quoted by General Conley as being 988,053 and from Kenova to Portsmouth as being 574,258, the total being 1,562,311 my calculation shows the car miles from E. Williamson to Kenova would represent 63.243% of the total, but these figures as I understand are submitted subject to verification by the figures of the Car Record Office of this Company.

(And at this point, the hour of 1 o'clock having arrived, a recess is taken until 2:30 p. m.)

151

Afternoon Session.

THURSDAY, January 30th, 1913.

The taking of deposition was resumed at 2:30 p. m. at same place, pursuant to recess from morning session, with the same parties present.

JOS. W. COXE, A witness heretofore introduced on behalf of complainant, on the stand on Cross-Examination.

By Mr. CONLEY:

X Q. 70. Mr. Cox, can you give the freight engine miles exclusive of switching on the Kenova Division in West Virginia and on the Kenova Division in Ohio for the year ended June 30, 1910, and what per cent of the total is made in West Virginia.

A. I have not before me data which will enable me to say what the relative engine miles on the line between Kenova and Portsmouth are in West Virginia and Ohio.

X Q. 71. I understand your records are such that you can readily refer to them, and will ask you to have them brought down and give us the figures.

A. I do not believe we could give you the actual figures in West Virginia and Ohio if the figures which you gave us this morning are supposed to be the actual figures. I cannot verify them. I tried to verify them and have not anything that will verify them. The figures you quoted this morning on freight car lines was, E. Williamson to Kenova 51,103,084, and from Kenova to Portsmouth 21,124,546. My mileage E. Williamson to Kenova shows 59,507,444, and from Kenova to Portsmouth 12,719,286, or a total of 72,227,630.

X Q. 72. Can you give us the figures for passenger car miles for the same year and on the same divisions.

A. From E. Williamson to Kenova the Attorney General read this morning 988,053 passenger car miles. Our sheets seem to show for that time 1,287,188. And the other figures, from Kenova to Portsmouth, which the Attorney General read this morning, were 574,258 passenger car miles, whilst our sheet seemed to indicate 275,123, that being for the year ending June 30th 1910, or a total of 1,562,311.

X Q. 73. What per cent does that give?

A. Well, that would give 82.39% on line E. Williamson to Kenova, and 17.61% on line Kenova to Portsmouth.

X Q. 74. Can you give the freight engine miles exclusive of switching on the Kenova division in W. Va. and on the Kenova division in Ohio, and what per cent of the total the West Va. portion is, and what per cent of the total the Ohio portion is.

A. I will have to look that up.

X Q. 75. Will you give the same information for passenger engine miles for the same division for the year 1910.

A. I will undertake to furnish that but can you give us your figures?

X Q. 76. I give you the following figures for the freight engine miles on this division subject to verification: E. Williamson to Kenova in W. Va. 1,460,221, and from Kenova to Portsmouth 578,919, or, a total of 2,039,140; percentage in West Virginia

153 71.61%. The same for passenger miles in West Virginia is, E. Williamson to Kenova, 187,197, and in Ohio 118,191, or a total of 305,388; percentage in W. Va. 61.3%.

A. All right.

X Q. 77. Will you give us your freight train mileage, including mixed trains, and all other freight, for that part of the Kenova Division in W. Va. E. Williamson to Kenova, and also the same information for the Ohio portion of this division, Kenova to Portsmouth, for the year 1910. I can give you the figures we have if you wish them.

A. All right.

X Q. 78. I give you the following figures subject to verification: In West Virginia, regular trains, 1,251,404, and mixed trains, 5,186; total, 1,256,590. In Ohio regular and mixed trains, 522,112, or a grand total of 1,778,702. Percentage in West Va. 70.65%.

A. Now can you give me the passenger?

X Q. 79. I wish the same information as to passenger train mileage in West Virginia and in Ohio, Kenova Division, including mixed trains. Do you wish our figures?

A. Yes.

X Q. 80. Passenger train mileage including mixed trains on this division in West Virginia, subject to verification, is furnished you as follows: 187,927, in Ohio, 111,774. Percentage in West Virginia 62.70%.

A. We will desire to verify these figures by our records.

154 X Q. 81. What was the truck mileage of the Kenova Division in West Virginia for the fiscal year ended June 30, 1910?

A. \$2.50% of road mileage, not track mileage, not including gas (tolls and franchise).

Q. Q2. What is the difference between "road mileage" and "track mileage"?

A. Track mileage would include all mileage and double track. Road mileage is simply the miles of main line and branches. I had the same thing this morning when I corrected your track to road.

Q. Q3. Can you give the percentage of track mileage on the Commerce Division in West Va.?

A. I could not without looking it up. I have the track mileage but not the road mileage.

Q. Q4. Which did you use in allocating your expense to West Virginia?

A. I used road mileage.

Q. Q5. And that is 2.50%?

A. Yes, 2.50%.

Q. Q6. It will not then be necessary to work up the track mileage. Mr. Cross, is it not a fact that your showing of cost allocated by you to the Federal cost for carrying passengers, being about \$45.00 cents for 1907, and 45 cents for 1908, and 100.00 cents in 1909 depend on one of the factors on the operating cost changed in West Virginia?

A. I should say that that was the case. But the total expense charged to West Virginia on the passenger matter is in the 125 cents reflected on the interstate business passenger, and consequently in the percentage of operating cost.

Q. Q7. Mr. Cross, will it come 15 off your direct maintenance and also what per cent of road track in West Virginia is on your Potomac and Kanawha Divisions, as was for the year 1907?

A. What portion of page 15 do I stand on?

Q. Q8. How much the latter part which you put "initially" the Potomac Division showed as Williamsburg 25.75 miles the 5.28 miles in Virginia at 1.00%, and 200.00 miles in West Va. at 20.07%? Please consolidate the mileage in West Virginia to Potomac and give us the total West Virginia mileage on the Potomac and Kanawha Divisions.

A. The total miles in 1907 in West Virginia was 200.00, and the total miles on the Potomac and Kanawha Divisions in West Virginia was 200.00. Do you want to know what the percentage is as shown then of the total West Virginia mileage?

Q. Q9. Was 20.07% I think it is.

A. Yes, 20.07%.

Q. Q10. Can you give me the percent for the year 1909?

A. Yes, 27. The total mileage in West Virginia in 1909 was 200.00, as shown mileage on the Potomac & Kanawha Division in W. Va. was 215.25 or 21.26% of the total.

Q. Q11. If the business conducted on the Potomac & Kanawha Divisions is heavier per mile than the other lines which it are in

For that reason even in the year 1909 when I say that the engine miles were 21% passenger and 79% freight we still adhered to the 20% passenger and 80% freight as a means of facilitating the and expediting the work.

X Q. 103. If you were on the Chesapeake & Ohio Ry. Co. as stated in my question above, would you use the actual figures as shown by the books of the Chesapeake & Ohio Ry. Co. or percentages derived therefrom, or would you carry your experience from the Norfolk & Western Ry. Co. over to that road, and use 20% for passengers regardless of what the actual figures of the C. & O. Ry. Co. might show?

A. No, sir; I should say not. I think I should be inclined on the C. & O. Ry. Co. if I found the engine mileage 25% for passenger and 75% for freight to use that percentage instead of 20% and 80% as we use on the Norfolk & Western. I just want to add on that point that it is very important in order to expedite the work to have round percentages. For instance, 21% and 79% would be very awkward to figure on all these general expense bills. If on the Chesapeake & Ohio Ry. I found it necessary I would probably stretch the percentages a little; that is, if I found it 26 and 74 I would probably continue to adhere to my 25 and 75; or, probably if it dropped down to 24% passenger and 76% freight I would continue to adhere to 25 and 75, which would be a very close approximation of the actual percentages.

X Q. 104. Based on their figures?

A. Yes, based on their figures.

X Q. 105. Will you give us the revenue from passenger engine miles and the total revenue from engine miles on the Potomac Division and that part of the Kenos Division in West Virginia for the year 1910, stating the minimum engine miles as $\frac{1}{4}$ passenger and $\frac{3}{4}$ freight?

159 A. That would have to be calculated.

X Q. 106. I give you the following figures for verification:

Division.	Class.	Freight.	Passenger.
Potomac	Regular	2,429,157	471,585
	Mixed, $\frac{3}{4}$ Frt.	5,558	.....
	Mixed, $\frac{1}{4}$ Pass.	.....	1,852
Kenos in W. Va.	Regular	1,469,221	187,197
	Mixed, $\frac{3}{4}$ Frt.	2,968	.....
	Mixed, $\frac{1}{4}$ Pass.	.....	1,900
Totals		3,898,844	664,937

What percent does that give to passenger? Our figures are 14.59%. See if that is correct?

A. Our figures and yours are closely together. The percentage as we make it in round figures, based on the figures which you are giving us of course, are, for passenger 14.57% and freight 85.43%.

X Q. 107. That is on the basis of $\frac{3}{4}$ for freight, and $\frac{1}{4}$ for passenger?

A. No, it would be 84.26% for freight and 15.74% for passenger.

on that basis of distributing the mixed trains, $\frac{3}{4}$ freight and $\frac{1}{4}$ the passenger.

X Q. 108. That is, your total mileage instead of showing 14.59% for passenger shows 15.74%?

A. Yes, on the formula suggested by you and worked out on the mileage which you furnished.

X Q. 109. Your freight and passenger mileage is not the same as we quoted, then?

A. No.

X Q. 110. Then, if you would add to your 15.74% the small portion for the Shenandoah and Radford divisions in West Virginia you would have about 16% for passenger and 84% for freight, would you not?

A. That is printed on the mileage basis. The percentage including that shows freight 83.77% and passenger 16.23%. This is West Virginia engine mileage now you understand, including the Shenandoah and the Radford Division.

X Q. 111. What was the total passenger and freight engine miles as found on page 23 of your printed annual report for the year 1910?

A. The total passenger revenue locomotive mileage was 4,024,128, and freight was 15,139,357 making a total mileage for regular trains, passenger and freight, 19,163,485.

X Q. 112. What about mixed trains?

A. The locomotive mileage was 191,574.

X Q. 113. Making a total for regular and mixed trains of how much?

A. 19,355,059.

X Q. 114. And as to passenger trains it is what?

A. 4,024,128.

X Q. 115. Adding one fourth of the mixed trains as passenger what does it make?

A. 4,972,922 miles.

X Q. 116. Mr. Cox, will you now deduct from the system total the West Virginia totals from which you produced your 16.23% passenger, and give the passenger percentage for the balance of the road outside of West Virginia.

A. The percentage of the line outside of West Va. would be, freight 77.25%, and passenger 22.75%, this being based upon the result June 30, 1910.

X Q. 117. Mr. Cox, why would you treat the West Virginia divisions of your line differently from the way you would treat the separate roads when it was necessary to show the cost in West Virginia, as it is in this case?

A. The 20% which has been applied to the common items is the percentage based upon the passenger and freight road engine miles of the system, and I have not treated it any differently as I see on that line from the balance of the lines.

X Q. 118. If you take into consideration only that part of your system treated in West Virginia you will find that only 16.23% of

the engine mileage is passenger, while outside of West Virginia it is 22.75%, is it not?

A. Yes, sir.

X Q. 119. Why do you discriminate between the whole and the portion in West Virginia?

A. Well, on that basis if I had applied this percentage of 22.75 I would have been more severe on the line in West Virginia. I have however only treated it on the percentage based upon the system road engine miles.

X Q. 120. Isn't 22.75 the percentage outside of W. Va.?

A. Yes.

X Q. 121. What is the percentage then in West Va.? Isn't it 16.23%?

A. Yes, 16.23%.

X Q. 122. If that part of your line in West Virginia were separated from the Norfolk & Western, say like the C. & O. Ry. Co., and you were Auditor of that road, would you not use the actual figures, or would you use 16.23%?

A. I would use a percentage based upon the road engine miles, passenger and freight, on the C. & O. Ry.

X Q. 123. Then if that part of your road in West Va. were a separate line and had a separate name would you use 16.23%?

A. I would use whatever per cent was based upon the road engine mileage, passenger and freight.

X Q. 124. Pertaining to the matter of allotting capitalization to West Virginia, as stated on page 7 of your direct examination that for the year 1907 the earning per cent of intrastate total was \$1,391,902.31, did you not?

A. Yes, Sir.

X Q. 125. And that this sum was 4.49% of the \$31,000,051.45 assessed value of property in West Virginia, did you not?

A. That is a fact.

X Q. 126. And you continue the same value, \$1,391,902.31 in 1908, as stated on page 31 of your direct examination, regardless of the fact that the earnings had changed in that year, and you say it was "certainly no less" meaning in 1908?

A. I would say that the assessed value of the property was practically the same in both years, 1907, and 1908. In the exhibit for 1907 I allot of the total capital to intrastate passenger business \$1,689,502.81 and figure a return on that basis. For the year ended June 30, 1908 I take the return on Intrastate passenger business at a valuation of \$1,519,000.00. The gross earnings in 1907 being \$8,090,082.56, and in 1908 \$7,429,544.14. I think possibly there may be a little confusion in these figures for the reason that all of these exhibits show the figures quoted in the bill upon which this action was brought, and on the same exhibits I show the figures upon which we are working out our returns, which are a little different from the figures shown in the bill.

X Q. 127. I wish you would refer to page 7 of your direct examination and see if it is not \$1,391,902.31 quoted in answer to question 23, near the middle of the page?

A. I am under the impression that that series of questions was put by Judge Holt, and that he was referring to the bill which the Norfolk & Western Ry. Co., had filed, because I see at the bottom of page 7 that I stated the gross earnings from passenger were \$362,997.74, being from the transportation of passengers exclusively, and those were the figures which were used in the bill. In the exhibit afterwards made up however I have shown the original figures used by Mr. Reath in preparing his bill, as well as the figures showing the addition of the byproducts, and show larger earnings and somewhat larger capital in that way.

X Q. 126. Mr. Cox, turning to page 56 of your direct examination see if you do not use the same figures as to valuation, \$1,391,902.21 for the year 1909, when the percentage was only 3.63 instead of 4.49 in the previous year.

A. The percentage upon which we worked the return in 1909 was 4.58% of \$32,000,000.00 or \$1,465,600.00, the 3.63% referring to the fixed percentage of intrastate passenger revenue excluding byproducts.

164 X Q. 129. Have you not quoted the same figures, \$1,391,902.21 all the way through, regardless of the fact that the percentages as given by you on your exhibits changed?

A. The figures upon which our exhibits are based are the assessed valuation based upon the earnings from intrastate passenger business, with its byproducts, as compared with the entire aggregate gross earnings in the State. I am under the impression that in drawing up the bill that division undoubtedly was allowed to remain undisturbed in all our exhibits, we attempting to make an actual separation of the assessed value based upon gross earnings including the intrastate revenue and the byproducts, as compared with the aggregate earnings of the State for each year.

X Q. 130. Examine your exhibit D-2 and see at the foot of that exhibit if you did not use the amount on same?

A. The amount that I have extended on the exhibit is \$1,465,600.00.

X Q. 131. But look at the last line on exhibit D-2 and see if you do not use \$1,391,902.21?

A. I used there the assessed value of the property on the basis used in the bill, based on the assessment for 1907, of \$31,000,451.45, which, multiplied by 4.49%, makes \$1,391,902.21.

X Q. 132. How much of your total expenses, freight and passenger, is divided between freight and passenger on the engine mile basis?

A. I should say it was very close to 35%. Probably some years it might run 36% and other years 34%.

165 X Q. 133. Do you mean 35% passenger?

A. No, there is a certain amount of common items which are divided on engine mileage and it runs about 35%.

X Q. 134. I will ask Mr. Hillman to propound a question or two to you which embrace so many percentages that I do not know that I understand the matter exactly.

By Mr. HILLMAN:

X Q. 134. Mr. Coxe, you say that 35% or approximately 35% of your expenses have been divided between freight and passenger on the basis of engine mileage. 20% is the engine mileage which you used. And you used 16.23% for the passenger proportion of the engine mileage which you have just shown to be the percentage in West Virginia. How much would that affect the total assignment for passenger expenses in West Va.? It would be 3.77% of 35%, would it not.

A. I should say so.

X Q. 135. And that figure would be 1.32% of the total passenger expenses?

A. Yes, of which a certain proportion would be chargeable to intrastate passenger business.

X Q. 136. Certainly. Will you please make a memorandum of that 1.32% to be used a little later.

Mr. Conley, continuing.

X Q. 137. Are you conversant with the methods of making rates; that is, what elements are taken into account when rates are made?

A. No sir I am not a rate traffic man.

X Q. 138. Then you cannot say whether the cost enters into rate making?

A. I would not express an opinion on that.

X Q. 139. Have you ever been called upon to make any statement for your traffic department of the cost of carrying any particular commodity, and if so state what it was?

A. No, sir.

X Q. 140. Would any other department attempt to make up the cost of doing any particular class of business?

A. I should say not.

X Q. 141. You have however used the earnings as a basis for determining the expenses, that is, for intrastate freight and passenger expenses, have you not?

A. The exhibits which I have prepared in this case show that the freight expenses are practically sub-divided between intrastate and interstate on the basis of gross revenue.

X Q. 142. Should freight rates for intrastate be reduced one half that would, under your plan, cause a corresponding reduction in intrastate expenses, would it not?

A. If we had our total expenses and we divided it between the two classes of business, and the gross earnings for the business fluctuated the natural result would be a fluctuation.

X Q. 143. Would that be true regardless of the fact that there was not a pound of coal for fuel or any more labor used at full rates than would be used at half rates?

A. I do not comprehend that question.

X Q. 144. As an example, would it cost any more to carry a passenger when he was paying two cents per mile under the passenger rate involved in this case than when he was paying say two and one half or three cents per mile.

A. I should say that the physical cost would remain the same.

X Q. 145. I believe you stated that the operating expenses and the cost of carrying any commodity, whether freight or passenger, depends upon the rate charged.

A. I do not know that I said that.

X Q. 146. What did you say?

A. I simply stated that our freight expenses and passenger expenses had been subdivided on the assumption that the cost of earning a dollar was the same on each class of business.

X Q. 147. Well then, Mr. Cox, if the cost is not considered in rate making do you think that if you determine the cost of anything by its price, when that cost was not considered in making the price, it is a defensible proposition?

A. I stated that I did not know whether cost was considered or not.

X Q. 148. Well, my question is a hypothetical one?

A. I should say that the allotment of expenses on freight traffic on the basis of earnings would furnish some indication that the intrastate business might be more costly for handling than interstate.

X Q. 149. Mr. Cox, if the cost has been considered in making the rate do you think that the cost on which the rate was made was a proper factor to use and not the rate itself?

A. I do not know that I grasp your meaning.

X Q. 150. I will ask the reporter to read the question.
168 (Which is done.)

A. I think I will have to give that up. It is too much for me.

X Q. 151. Well, it is getting quite late and I expect we had better adjourn until tomorrow morning.

(At 6 o'clock p. m. an adjournment was taken until tomorrow, Friday morning, January 31, 1913, at 10 o'clock at same place.)

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MORNING SESSION.

Friday, January 31, 1913. The taking of depositions was resumed at 10 o'clock a. m. at the same place, pursuant to adjournment yesterday afternoon, with the same parties present.

Jos. W. COX, on the stand on cross-examination from yesterday.

By MR. CONLEY:

X Q. 152. Mr. Cox, the dividing point of the Kenova Division between West Virginia and Ohio is at Kenova, is it not?

A. In a general way I would say yes. The bridge there is included in the West Virginia mileage, and we pay taxes on it in West Virginia. But the dividing point would be a little beyond the Kenova Station. It is low water mark on the Ohio side of the River as we generally describe it.

X Q. 153. Does the line from E. Williamson to Kenova represent the West Virginia part of the Kenova Division?

A. It does.

X Q. 154. And does the line from Kenova to Portsmouth represent the Ohio part of this division?

A. It does.

X Q. 155. Please give the mileage from which you derive your 82.39% road mileage in W. Va. on the Kenova Division?

A. Are you referring to the year 1910?

X Q. 156. Yes, that is the year we were considering on yesterday.

170 A. The total mileage in West Virginia is 453.32, of which 169.69 is in West Virginia on the Kenova Division and 36.26 in Ohio, making 205.95 Kenova Division mileage.

X Q. 157. And the figures you gave us yesterday in regard to car miles and train miles as being the West Virginia portion of the Kenova Division, bearing the percentage of 82.39 of the total, were they carried over to West Virginia on the road mileage percentage?

A. The figures given yesterday would be based on the road mileage percentage.

X Q. 158. I believe however engine miles are not on the same percentage. Are they actual miles?

A. The freight engine mileage given yesterday was on the actual basis, and the passenger and mixed engine mileage on the prorata basis.

X Q. 159. Have you in the records of your Company figures which will actually show the actual car miles made and the actual train mile made in West Virginia and in Ohio on the Kenova Division?

A. I think we have.

X Q. 160. Mr. Cox, I believe on yesterday when figures were given you in certain questions I propounded for your verification that you stated the most of them were not correct as given you. Does my recollection serve me right in that respect?

A. I stated that the figures you quoted did not agree with our records and that we were going to verify them.

171 X Q. 161. The figures that you gave subsequent to those questions, each of which bore the percentage of 82.39, were corrections of the figures I gave you, were they not?

A. Well, I could not answer that, General. I would have to know what is on the record. What we have are the correct results, of course, but just to answer your question off-hand I would not like to say whether they were corrections, admissions, or what they were.

X Q. 162. What we are after are the actual figures as shown by your records. The reason why I am rather insistent on this question is because we do not believe the figures from which you got the 82.39% in car miles and train miles are correct. In other words, that they are estimated and not actual, as we understand them, and that if you take the actual miles the percentage will be as we gave it to you on yesterday.

A. I understood there was a question propounded to me as to what our records showed were the actual engine miles in West Vir-

ginia, and an inspection of our records during the night shows as follows:

Freight	\$4,252,202	
Mixed, for frt. $\frac{3}{4}$ of total mixed.....	10,319	
	<hr/>	4,262,521
Passenger	758,279	
Mixed, for psgr. $\frac{1}{4}$ of total mixed.....	3,441	
	<hr/>	761,720
Making an aggregate total in West Va....		5,024,241

of which the freight engine mileage in West Virginia represents 84.84%.

I would say, however, that in combining this mixed that I understand it is contrary to the Interstate Commerce Commission's recommendations, where they suggest in forming percentages that mixed should be added to both passenger and freight. In this calculation I have followed out the suggestion by General Conley, of distributing the mixed three-quarters to freight and one-quarter to passenger. For the balance of the system the engine, miles would be:

Freight	11,020,516
Passenger	3,310,302
Total	<hr/> 14,330,818

the percentage being 76.90 for freight and 23.10 for passenger.

X Q. 163. Mr. Cox, can you give us the actual freight car miles on the Kenova Division, from Williamson to Kenova, which is the West Virginia portion of that division?

A. That is divided on the road mileage, and we have not the actual mileage.

X Q. 164. Do not your records show the actual mileage?

A. I should say not.

X Q. 165. I understood from the experts who examined your records for the defendant in this suit that your records did show the actual mileage, and that they are supposed to have a copy of those actual figures?

A. I have not any such records and do not know of any. Now, the experts who examined our records may have worked those figures up from some other source, but there is no tabulation of them in existence that I know of.

X Q. 166. I now hand you some statements which are alleged to show engine miles, car miles, and train miles, and will ask you to see if they are not copied from the actual figures as shown by the records of the Railway Co.

A. I will have them compared. (Which is done.) I wish to state that these have been compared with the records of the Car Record Office and we find these figures as shown on Mr. Hillman's statements are the actual mileages.

X Q. 167. Then the figures that I read into the record on yesterday and asked you to check were correct, relating to the freight car mileage from E. Williamson to Kenova, 51,103,084.

A. That is right.

X Q. 168. And from Kenova to Portsmouth O. 21,124,546?

A. That is right. These refer to freight car miles.

X Q. 169. The percentage in West Virginia being 70.75%.

A. We verified that on yesterday. That is right I see by my figures here.

X Q. 170. The figures for the passenger car miles for the same division, Williamson to Kenova, are 988,053?

A. That is right.

X Q. 171. And from Kenova to Portsmouth they are what?

A. 574,258.

X Q. 172. The percentage in West Virginia being what?

A. 63.243%.

X Q. 173. Now take the freight engine miles. Will you give the number of freight engine miles from E. Williamson to
174 Kenova?

A. 1,460,221.

X Q. 174. And from Kenova to Portsmouth it is what?

A. 578,919.

X Q. 175. And the percentage in West Virginia is what?

A. 71.61 per cent.

X Q. 176. Now give the same as to passenger engine miles, from E. Williamson to Kenova?

A. 187,197.

X Q. 177. And from Kenova to Portsmouth it is what?

A. 118,191.

X Q. 178. And the percentage in West Virginia is what?

A. 61.3%.

X Q. 179. Now have you included your mixed train miles as all passenger, and what is your passenger percentage?

A. That will have to be worked up. I can give it this way: The engine miles in West Virginia, adding to the freight three quarters of the mixed engine miles, and to passenger one quarter of the mixed engine miles, makes a percentage of 84.84% freight and 15.16% passenger.

X Q. 180. That is not what we were aiming to get. What we wish is to add to the passenger engine miles the full amount of the mixed train engine miles and then to get the percentage which accrues on the passenger engine miles to West Virginia, on the Kenova Division?

A. That is 61.95%.

X Q. 181. Will you kindly give your freight train mileage, including mixed trains as all freight, for the Kenova Division,
175 from E. Williamson to Kenova, and from Kenova to Portsmouth Ohio?

A. 70.65%.

X Q. 182. Now give the same for passenger, counting all mixed train miles as passenger.

A. 62.70%.

X Q. 183. Then, Mr. Coxe, these percentages of car, engine, and train miles, are all different from the 82.39% shown by the road mileage, are they not?

A. Yes, the road mileage would make 82.39%.

X Q. 184. Would not the same or similar discrepancies show in former years as between the track mileage in West Virginia and those factors of car miles, engine miles, and train miles, just enumerated?

A. Well, as far as I am concerned I have not used those factors in any of my calculations outside of engine miles. If similar differences had existed of course there would be corresponding differences in percentages based upon road mileage and the actual engine, train, or car miles—I say, if those differences existed.

X Q. 185. You assigned to West Virginia the expenses on the road mile basis, for the Kenova Division?

A. We have our operating expenses tabulated by operating districts, and where a district was in more than one State we subdivided those expenses on the basis of road miles.

X Q. 186. Your trainmen are paid practically on the mileage basis, are they not?

176 A. My impression is that in the coal fields some of them are paid on a day rate, but the majority of them are paid on the basis of one hundred miles minimum.

X Q. 187. Your fuel consumed is according to the mileage basis, also, is it not?

A. Yes, the fuel would be charged to each operating district, and if a district were in more than one State it would be subdivided on the basis of road miles.

X Q. 188. From the best information at hand I believe that of the total expenses of the combined Kenova and Pocahontas divisions about 40% of them accrue on the Kenova Division. Will you please confirm or correct that percentage?

A. I have not anything here showing that but could work it up. My exhibits are worked out on the entire West Virginia expenses. Of course, I could get it for the Kenova Division and make a pro rating of it.

X Q. 189. We are not asking for the West Virginia proportion but for the total expenses of those two divisions, Pocahontas and Kenova.

A. For what period?

X Q. 190. For the year 1910. Will you verify the 40% and give your answer later?

A. Yes, and while I have not those figures here now I will get them and give them to you later. (Later investigation shows this percentage to be 42.16.)

X Q. 191. For the year 1907 what percentage of the expenses did you bring over to West Virginia on the Kenova Division.

177 Look at page 12 of your direct examination.

A. That is explained on pages 12 and 13 of my direct examination. I see that I there used the following wording "simi-

larly with the Scioto Division from Williamson to Portsmouth we have 161.84 miles in West Virginia, a percentage of 80.58; and 39 miles in Ohio, representing a percentage of 19.42; so that the expenses of the lines from Williamson to Portsmouth that would be chargeable to the State of West Virginia 80.58%, and the State of Ohio 19.42%."

X Q. 192. What percentage of the expenses of the Pocahontas Division is chargeable to West Virginia?

A. The mileage, as I stated there, is Bluefield to Williamson 237.75 miles of which 7.14 miles are in Virginia, or 3.03%, and 230.61 miles in West Virginia, or 96.97%.

X Q. 193. Mr. Cox 40% of the expenses on the Kenova and Pocahontas Division are due to the Kenova Division and was charged to West Virginia on the basis of 80.58%, or 80.58% multiplied by 40% equals 32.232%. On the Pocahontas Division the remaining 60% was charged to West Virginia on the basis of 96.97%, and 96.97% multiplied by 60% equals 58.182%. If you add those two percentages together you have 90.414% as chargeable to West Virginia as the total of the Pocahontas and Kenova Divisions, have you not?

A. I could not answer that question without digesting it. We distribute the expenses of the Kenova Division on the basis of road mileage, and also distribute the expenses of the Pocahontas Division on the basis of road mileage. Now whether that proportion of the expenses from Williamson to Portsmouth was 40% of the total expense, is that the problem?

X Q. 194. We had that awhile ago.

A. Well, we have not verified that yet. That is the point though, 40%?

X Q. 195. Yes.

A. I will answer, that if the proposition as stated by the Attorney General of West Virginia is correct, that the expenses from Williamson to Portsmouth are 40% of the total expenses from Bluefield to Portsmouth, then we charge of that proportion from Williamson to Portsmouth 80.58% to West Virginia. Furthermore, on the Pocahontas Division if the line from Bluefield to Williamson represents 60% of the total expenses, we have charged up to the Pocahontas Division 96.97% of 60%.

X Q. 196. Will you give us the sum resulting from these two operations—40% of 80.58%, and 60% of 96.97%?

A. The 80.58% of 40% is 32.232%; and the 96.97% multiplied by 60% produces 58.182%. If those two percentages were added together it would make a total of 90.414%.

X Q. 197. Then of that 90.414% total expenses on the Pocahontas and Kenova divisions in West Virginia, 32.232% is on the Kenova Division, or, 35.65% of the West Virginia expenses on those two divisions is on the Kenova Division?

A. If the combined percentages—90.414%—which represent the total expenses on the Kenova and Pocahontas Divisions, are divided into 32.232%, the percentage on Kenova Division results in 35.65% of the West Virginia expenses on those two divisions being on the Kenova Division.

X Q. 198. Then the West Virginia passenger percentage on the Kenova Division as brought out in this examination, was, engine miles, 61.3%, train miles 62.7%, the average of the two percentages being 62%, is it not?

A. Yes, 62%.

X Q. 199. Please subtract this average from the 80.56%?

A. The difference is 18.56%.

X Q. 200. Then we have just calculated that 35.65% of the West Virginia charge was brought over in the road miles on the Kenova Division, and if you multiply 35.65% by the 18.56% what do you have?

A. The mathematical calculation of 18.56% multiplied 35.65% is 6.62%. I do not however admit that this has any bearing on any of the exhibits that I have filed, but am simply verifying the calculations as suggested by counsel for Defendant.

X Q. 201. If you add to the 6.62% the 1.32% noted on your memorandum yesterday at my request the result will be how much?

A. 6.62% and 1.32% makes a total of 7.94%.

X Q. 202. Had you followed the methods we have indicated here based on the actual figures instead of your 80.56% of the divisions West Virginia then your 29% engine miles would have assigned approximately 7.94% less of the total to West Virginia passenger, would you not?

189 A. That is a little deep to answer off hand.

Complainant's Exception.

Counsel for Complainant excepts to the question just propounded as well as to all questions preceding same and leading up thereto the purpose of which question was unknown to Complainant because in event the defendant desired to change the basis of ascertaining the expenses it should have made the investigation necessary as to do and have put a witness on the stand for that purpose, and that such testimony as is now adduced to prove the fact is irrelevant.

Defendant's Answer.

Counsel for Defendant replies that he is simply asking the witness to correct statements filed by him on his direct examination by the actual figures admitted by him to be correct on his cross-examination as shown by the records of the Company.

Complainant's Response.

Counsel for Complainant excepts to the question just propounded he said, states that no such figures as are attempted to be brought out in this cross-examination have been produced by the witness on behalf of the complainant. And, on the other hand, that the figures presented are figures assumed to have been ascertained by the Defendant, and Counsel for Complainant claims that they should have put a witness on the stand to prove the figures and the purpose of the introduction of any such figures, and that Defendant cannot prove its own case indirectly.

184 A. It would have been double the amount \$930,362.50.

X Q. 216. Or, \$1,850,725.00?

A. Yes, \$1,860,725.00.

X Q. 217. If dividend number 26 had been paid at the rate of $2\frac{1}{2}\%$ on \$80,145,000.00 how much would it have made?

A. \$2,003,625.00.

X Q. 218. Dividend number 27 at the rate of $2\frac{1}{2}\%$ on \$83,820,000.00 of stock would make how much?

A. \$2,095,500.00.

X Q. 219. Dividend number 28 at $2\frac{1}{2}\%$ on \$85,240,000.00 would make how much?

A. \$2,131,000.00.

X Q. 220. Making an aggregate in dividends for the year ended June 30, 1912 of how much?

A. \$8,090,850.00.

X Q. 221. You have just stated that there was available for dividends on common stock \$8,462,006.41, and if you deduct the amount of dividends that you have just quoted \$8,090,850.00 from that amount it will leave you how much?

A. \$371,156.41. I want to state that such a proceeding on the part of any railroad company would be decidedly unbusiness like, and it is not probable that they would ever declare a dividend of 10% when by so doing they would make no provision out of income for additions and betterments; or appropriation for discount on securities sold, or anything of that kind. To simply make the bare statement that they could declare that much in dividends I

185 hardly think a proper one because no railroad would do it, or certainly no conservatively managed railroad would do it.

X Q. 222. After declaring such dividends you would have \$371,156.41 surplus?

A. Yes, but with no provision for additions and betterments, which must be paid for out of income.

X Q. 223. Are you aware, Mr. Coxe, that the Supreme Court of the State of West Virginia has declared that in arriving at the legality of a rate fixed by the legislature you must treat the purchase of additional equipment and extension of lines and other improvements as a part of the net earnings; the decision being in the case of the Coal & Coke Ry. Co. against Conley and others?

A. No, sir I cannot say that I was aware of that.

X Q. 224. Then, Mr. Coxe, these dividends aggregating 10% for the year ended June 30, 1912 could have been declared notwithstanding the fact that the Railway Co. has increased its common stock since the institution of this suit several millions of dollars? In other words, in arriving at the dividend of 10% you included in the amount of stock on which it could have been declared the increase in the common stock, did you not?

A. I took the common stock as it stood at the time of each declaration of dividends.

X Q. 225. Will you please tell me how much the common stock the Norfolk & Western Ry. Co. has been increased since the institution of this suit?

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Complainant's Exception.

Counsel for the Complainant excepts to the question because irrelevant, having no relation to any of the issues in this case.

A. This bill I presume would be the governing date. It seems to have been filed, approximately, June 1st 1909.

X Q. 226. That will be near enough for the purposes of my question.

A. The common stock outstanding on June 30, 1912, was \$85,-653,000.00, and as of June 10, 1909, the common stock was \$66,-000,000.00, being an increase of \$19,653,000.00.

X Q. 227. During that period has there been any increase in the preferred stock.

A. No sir the preferred stock has remained stationary.

X Q. 228. I will ask you to state the average fare per passenger per mile over your entire system for the year ended June 30, 1911, and also for the year ended June 30, 1912.

A. The average rate of revenue per passenger per mile on the entire Norfolk & Western System for the year ended June 30, 1911 was 2.16 cents. The average revenue per passenger per mile on entire Norfolk & Western system for the year ended June 30, 1912 was 2.142 cents.

X Q. 229. Do you sell two cent mileage books for your system good in West Virginia?

A. The local mileage books are good in West Virginia.

X Q. 230. Which are sold at the rate of two cents per mile?

A. Yes, sir, 2 cents, sold in books of a 1000 miles each at \$20.00.

187 X Q. 231. What rate per passenger per mile with ordinary baggage are you now charging for intrastate passengers in West Virginia?

A. Two and one half cents.

X Q. 232. That is all I believe.

(And a recess is taken at 1 o'clock until 2:30 p. m.)

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Afternoon Session.

FRIDAY, January 31st, 1913.

The taking of depositions was resumed at 2:30 p. m., pursuant to recess, at same place and with the same parties present as noted on yesterday.

JOS. W. COXE—A witness for Complainant, heretofore on the stand and examined in chief and cross-examined, is re-examined as follows:

By Mr. COCKE:

R. Q. 1. Mr. Cox, during the course of your cross-examination you were asked quite a number of questions to the effect that in your

examination-in-chief you had used a fixed capital for three years—\$1,391,902.31—the operations of which years were used in the bills filed in this case, said amount being used for all three years as the amount of capital to be appropriated to the doing of intrastate passenger business in West Virginia. Will you please explain why you in your testimony in chief used the same amount of capital for each one of those years although the amount of earnings upon which you based your capital was different during the three years under investigation?

A. My testimony during the original or first hearing in this matter was largely based upon the bill which had been drawn by, I think Mr. Reath, and was based upon the transportation of passengers exclusively, and the total assessed value of property in the State of West Virginia being divided on the basis of the earnings, resulted in the capital of \$1,391,902.31 appearing on my exhibit 189 and in the bill as based upon the revenue from passengers only. In drawing up the figures for the subsequent year, as a matter of convenience, it was simply assumed that the capital remained the same, it being known that the assessment was certainly no less than it had been in previous years, and the valuation being based upon the tax assessment was contained in that way from year to year?

R. Q. 2. The amount of earnings during the years 1908 and 1909 from the intrastate passenger business did not make the capital involved when distributed on the basis of earnings any less than the amount that you had ascertained to be the capital for the year 1907 and which you used as a minimum basis. Is that right?

A. That is not correct, for the reason that in the bill the same capital on intrastate passenger traffic, excluding byproducts, was used for the years 1907, 1908 and 1909.

R. Q. 3. However, the exhibits which you filed during the course of your examination-in-chief, were they based upon the revenue from the passenger business alone, or were those exhibits based upon the revenue received from passengers on passenger trains, not only from the fares of the passengers but also from what is commonly called byproducts incident to passenger business, such as mail, express, and excess baggage?

A. The exhibits which I prepared and filed in the case showed both the returns from passengers exclusively, and also revenue from passengers including what western byproducts, in the way of excess baggage, mail, express, and other miscellaneous train earnings. In dividing the capital on this combined revenue for passengers 190 and miscellaneous revenue, and the division being based on gross earnings, the capital being distributed to each class of business according to the gross earnings of that class of business, it naturally varied from year to year, but, as before stated, in the bill Mr. Reath, who drew up the bill, simply used the capital of \$1,391,902.21 as a matter of convenience, feeling that the capital was certainly no less than it had been before, and in order to avoid any question of method of division we simply continued the same capital from year to year to prove the bill.

R. Q. 4. As I understand the subsequent exhibits that you filed as a part of your testimony showed the capital for these respective years varied according to the percentage of intrastate passenger business as compared with the entire business of the Company to which this capital was allotted.

A. That is a fact.

R. Q. 5. If you have convenient a summary of the results of your testimony and exhibits in connection with the business of the Company for the years 1907, 1908, and 1909, in which the results based upon the revenue from passengers only and also based upon revenue from passengers including the revenue from byproducts are shown I will be glad if you will file such exhibits for convenient reference hereafter.

A. I file such exhibits, marked Exhibit J-1, embracing the figures already included in Exhibits D-2, C-2, and B-2 for the years ending June 30, 1907, 1908, 1909 respectively, which shows a return on the passenger business exclusively, that is from the transportation of passengers exclusively, of 3.73% and including byproducts 191 of 3.84%. This is, for the year ended June 30, 1907, being the year when the 3 cent rate prevailed up to May 31, 1907. For the year ended June 30, 1908, I show a rate of return on the capital based upon the allotment of the tax assessment on the transportation of passengers exclusively of 1.04%, and including byproducts of 1.19%. For the year 1909, when the 2 cent rate was in effect the entire year, there was no revenue left for application to the capital, which, in the case of revenue from the passenger business including byproducts, was \$1,465,600.00 in which there was a deficit of total income applicable to capital of \$616.11.

R. Q. 6. In ascertaining the amount of expenses incurred in doing the passenger and freight business of the Norfolk & Western Ry. you have heretofore testified, as I understand it that for all practical purposes 65% of those expenses are divisible by actual physical separation of the items of expense which appropriated themselves to the two branches of business, and of the remaining 35% of those expenses you divide and appropriate on the basis of the respective engine mileage of the two classes of business. You have also testified that the result of a number of years experience on the Norfolk & Western Ry. has shown that *that* engine mileage of the two branches of the business is respectively 80% and 20%; that is to say, 80% of your engine mileage is freight engine mileage, and 20% of your entire engine mileage is passenger mileage. You have been cross examined on this basis of division of expenses with the implied criticism that it is inaccurate and improper as a mode of division, 192 and it has been suggested that the actual engine mileage be ascertained for the purpose of dividing the expenses in this case. Will you please state how it was that the ratio which you have adopted came about, and whether or not in your judgment it is a proper and substantial mode of dividing these unallocated expenses?

A. I would state in reply to that question, which is a somewhat general inquiry, that I do not think the accuracy of the freight and

passenger mileage of the system was questioned, but the freight and passenger engine mileage in West Virginia.

R. Q. 7. Yes, that is right.

A. As I stated, I think on yesterday, it is very essential in practical accounting to have per cents which will apply themselves to ready application in making divisions, provided facts will sustain them generally, and it has been the practice on the Norfolk & Western Ry. for several years back to use this division of 20% for passenger and 80% for freight, feeling that it was a fair and closely approximate separation of the expenses. I think in some years it would not run actually 20% and 80% but would be sufficiently close to those percentages to justify that application.

R. Q. 8. You have considered from time to time and in the various investigations that you have made with regard to rate cases, the other grounds of division of these expenses which have been suggested, namely, car miles, tonnage miles, and engine miles, and I will be glad now for you to state whether or not under all of
193 the circumstances which have been considered in ascertaining a reasonable division it is still your judgment that the division on the basis of engine miles more nearly approximates a correct division than any of the other divisions which have been suggested. Of course, I mean taking it as a whole.

A. I have from time to time investigated the theories of division and while a majority of them have certain features of merit, and show a somewhat greater refinement of the basis of division, I realize that no fixed plan could be generally adopted but must necessarily vary according to the circumstances connected with each railroad. I believe on the Pennsylvania R. R. I might prefer train miles to engine miles, but with the Norfolk & Western Ry. where we formerly used train miles, my purpose was to get a division that would be practical and at the same time fairly accurate. I was desirous of treating the passenger business as favorably as the circumstances would permit, with fairness to both classes of traffic, and the Norfolk & Western Ry. being largely a mountain road, crossing two chains of mountains, and especially in the western section running through a rugged country, with numerous curves, more or less grades, and necessitating what we term double-headers on a majority of the freight trains, I felt that for the Norfolk & Western Ry. as a whole the engine miles would be preferable to train miles.

R. Q. 9. Will you give the percentage of actual engine miles in West Virginia divided between freight engine and passenger engine mileage, for the three years 1907, 1908, 1909, for which
194 years you furnished a statement of the business of the Company.

A. For the year 1906-7 the percentage of engine mileage in the State of West Virginia was as follows: Passenger, 17.2%; freight, 82.8%. For 1907-8 the percentage in West Virginia is 19.72 for passenger and 80.28 for freight. For the year 1908-9 the percentage was 18.76 for passenger and 81.24 for freight.

R. Q. 10. Mr. Cox, in your cross-examination, as I have stated before, you were criticised for using your ratio of 20% for passenger

and 80% for freight in dividing the expenses, that being the relative freight and passenger engine mileage upon which your calculation was based. I now ask whether or not you have made up an exhibit for the year ended June 30, 1909, the last year the accounts of which you dissect and furnished exhibits for, on the basis of the actual passenger mileage for that year in West Virginia; and if so, I would be glad that you would file such exhibit, and state briefly the result of the division on the basis of the actual mileage in West Virginia for that year.

A. I file such exhibit and ask that it be marked "Exhibit K-1." In preparing our data for the exhibit D-2, filed with the original testimony of this case, the engine miles of the system, passenger and freight, were used on the basis of distributing as we term common items as between passenger and freight. When the point was raised that it might have been better to have applied the engine mileage in West Virginia instead of the engine mileage of the system, I was interested to see what the result would be if we followed the plan generally outlined by the defense, assuming that 35% of the total expenses in the State for any items upon which the 20% and 80% had been applied, should be used. I therefore took from my exhibit D-2 the total expenses in the State, passenger and freight, of \$4,921,368.50, and eliminated therefrom 35% or \$1,722,478.98, of which \$344,495.80 was passenger, and \$1,377,983.18 freight, and then added back this same amount \$1,722,478.98, on what it would have been had the local West Virginia engine mileage been applied instead of the system mileage. I then subdivided these revised results between passenger and freight expenses on the basis of earnings, and the result is I show the operating expenses for intrastate passenger business \$335,576.42, with taxes \$12,413.87, making an aggregate sum for operating expenses and taxes of \$347,990.29, which I divided by the intrastate passenger revenue, and produced a percentage of 97.88. This is on the passenger traffic. This revision slightly changes the intrastate freight as well as passenger, and on the freight the percentage is 63.54%, and on the combined passenger and freight 87.03%. Adding to this the 23% figured by Mr. Hillman as the proportion of gross earnings consumed in the payment of interest, dividends, etc., we would have a total of 110% of cost on the intrastate passenger and freight traffic.

R. Q. 11. My understanding is that you have not prepared any similar exhibits covering the years 1907 and 1908, but I will ask you whether or not viewing the actual passenger engine mileage for those years, which you have testified to, and applying it to the situation as shown in your exhibit for 1907-8, the use of the new factor for division of passenger and freight engine mileage would to any substantial degree change the results of the exhibits you have heretofore filed for 1907-8?

A. The engine mileage for 1907-8 is practically 20% and 80% in West Virginia; that is, 19.72% for passenger and 80.28% for freight, so that there would be very little difference for that year.

In 1906-7 there would be some difference from the fact that the passenger mileage is 17.02% where we use 20%. It is more accentuated in 1906-7 than in 1907-8, but in neither case would it be sufficient to change the issue as shown in my exhibits.

R. Q. 12. Mr. Coxe, you have heretofore testified in this case, and your testimony heretofore has been entirely confined to giving the results of your study as to the revenue from your intrastate passenger business, as well as an endeavor to ascertain the cost at which that revenue was earned. Since you testified in chief Mr. Hillman, an expert witness for the State of West Virginia, has testified and shown as a result of his study and investigation, that practically the entire revenue derived from intrastate passenger business in West Virginia was consumed in the expenses necessary to earn that revenue, together with taxes. Later however an attempt has been made by the State of West Virginia to show that the entire revenue from Intrastate passenger and freight business was
197 sufficient to justify the reduced passenger rate without depriving the capital invested in both classes of business of a return thereon. I now desire to ask you some questions with reference to the character of the Intrastate freight business in West Virginia, and for this purpose I ask you first what are the elements which make one class of freight business more costly than another class?

A. The factor whether it was package or car load freight; whether it was freight which had a long haul or a short haul; whether it was freight which traveled from point of origin to its terminus on the main line, or whether it was interchanged between main line points and various points on branch lines, or whether it was branch line tonnage going from one branch line over the main line to another branch line.

R. Q. 13. Will you please state what is the great preponderating class of freight in West Virginia.

A. The great tonnage in West Virginia is coal and coke.

R. Q. 14. That moves, to all intents and purposes, in Interstate Commerce?

A. Yes, sir; almost exclusively. There is a little intrastate coal business but no intrastate coke business.

R. Q. 15. Of the entire tonnage of freight in West Virginia what is the percentage of it that is coal and coke and which you say moves in Interstate Commerce entirely?

A. I have no such percentage on this statement, if you want to bring it out on this exhibit, but I can illustrate the relative proportion by reference to the month of May 1910, because I was
198 handling that month in connection with the exhibit which Mr. Hillman had prepared, which was numbered 5, and was based upon the month of November 1909, and the month of May 1910. I notice in the memoranda I have there that on the entire tonnage mileage from Bluefield to Williamson in the month of May 1910 the coal and coke represented 83%; that is, the entire movement of tonnage mileage coal and coke represented that amount.

R. Q. 16. Under what condition does that coal and coke move, from a standpoint of expense? Does it move in train loads and are the operating conditions favorable to the movement at the least expense?

A. I should say that the coal and coke business as a whole was an extremely homogeneous traffic, enabling most favorable results with the least cost consistent with the situation.

R. Q. 17. As a matter of fact the movement of your coal and coke has been the subject of investigation by public authority?

A. It has.

R. Q. 18. Was it recognized that it was moved at the least price and hence at the least cost of any traffic in this country?

A. I believe in the investigation of the Lake Coal Case it was shown that the rate per ton per mile on the Lake Coal was about the least rate of any compensation received for any commodity in this country, and that it could only be carried at that low rate under the very best possible conditions that the transportation of the commodity affords.

R. Q. 19. What is your mileage in West Virginia?

A. The total miles of road in West Virginia is 453.32 as of June 30, 1910, which was also the year in which Mr. Hillman made his experiment on his table, exhibit number 5, etc.

R. Q. 20. How much of that is branch line and how much main line mileage?

A. The main line mileage in West Virginia is 240.76 and branch lines 212.56, making the total of 453.32 miles. The main line is 53.11% and the branch lines 46.89%. Embraced in this mileage is the line west of Bluefield and to Williamson where the main line is 103.46 miles and the branch lines, 140.27 miles, a total of 243.73 miles, of which the branch lines represent 57.65% and the main lines 42.45%. On the line between Williamson and Kenova the main line is 28.29 miles and the branch line 71.40 miles, a total of 169.69 miles. The percentage of branch lines being 42.08% and the main line mileage being 57.92%.

R. Q. 21. Will you please state whether or not the expense of doing business on branch lines is more or less than the expense of doing business on main lines?

A. I would say as a general proposition it is far more expensive to do business on branch lines than it is on main lines.

R. Q. 22. If you have the amount of merchandise business—and in saying merchandise business I mean the business of the Norfolk & Western Ry. in West Virginia outside of its coal and coke business, interstate and intrastate, for the month of May, 1910, which is the month selected by Mr. Hillman for his analysis, I would ask you to please give it.

A. I would state that I have before me an approximate statement showing the relative proportion of intrastate and interstate freight traffic interchanged with branch lines, Bluefield to Williamson, during the month of May, 1910, which I made up when studying Mr. Hillman's Exhibit #5. The statement, as I say, is approximate because it necessitated going over the waybills and received reports,

and I have given it in pounds, so that it will not in every case actually check out to tons, although it is close to it. For that reason I speak of it as an approximate statement of intrastate freight traffic for the month of May, 1910, on the main line between Bluefield and Williamson, and it consisted of 95 cares of coal with an aggregate tonnage of 8,215,000 lbs., as compared with interstate coal of 2,778,012,000 pounds.

R. Q. 23: The movement of intrastate coal and coke as compared with interstate coal and coke is almost negligible, is it not?

A. Yes, sir; being 8,000,000 pounds as compared with 2,800,000,000 pounds in round numbers.

R. Q. 24. Now give the statement with reference to merchandise or commodities other than coal and coke.

A. The merchandise traffic, carload, intrastate business, consisted of 362 consignments, weight 15,000,000 lbs. The less than
201 car load consisted of 3258 consignments of an aggregate weight of 2,412,000 lbs. So that of the total number of consignments in the intrastate traffic, in which I have embraced coal on account of it being a limited item, the less than car load shipments represented over 87% of the entire movement of intrastate merchandise. Of the merchandise traffic, excluding coal and coke the intrastate represented a total weight of 17,422,624 pounds, of which there was interchanged with branch lines 57% whereas with the merchandise traffic, excluding coal and coke, in interstate movement, the tonnage interchanged with branch lines represented 5%. Of the entire intrastate merchandise, of 17,422,624 pounds, the less than car load shipments represented 14%, whereas with the interstate movement the less than car loads represented 2%. This is accounted for I think very largely in the merchandise by the fact that in interstate traffic on the Kenova Division there was a large movement, amounting to 317,000,000 pounds which originated and terminated east or west of Williamson, representing fast freight line traffic from the Steamers at Norfolk going west, and the traffic going east which comes from the northeast and goes to the south and southeast, in the way of grain and grain products meats and general produce business.

R. Q. 25. As I understand you, Mr. Coxe, as you have previously stated, the cost of doing any particular business, or the excess cost of doing a portion of the business as far as freight cost is concerned, does not arise from the fact that the merchandise or articles carried
202 were carried in interstate or intrastate business, but arises from the fact of whether it is handled locally or carried for long distance in what is known as through freight. Am I correct?

A. I think that would be a pretty clear synopsis of the matter. We all know that as far as local business is concerned it is more expensive than through business without defining it as interstate or intrastate.

R. Q. 26. As the result of your investigation in the month of May, which Mr. Hillman uses as his basis for ascertaining costs, does it carry home to your mind that the intrastate freight is carried

under local conditions at a vastly greater expense than interstate freight.

A. Yes, sir, I think this is true, that this statement would indicate that.

R. Q. 27. Does the same investigation show that intrastate freight is carried to a greater percentage under branch line cost as compared to main line cost in comparing this cost with the cost of doing interstate freight business.

A. The percentage of intrastate freight business interchanged with branch lines is vastly in excess of the corresponding percentage of interstate, and I think accounts for the largely increased cost.

R. Q. 28. Mr. Coxe, in your cross examination this morning you were requested to give certain figures and information for the year 1910, and especially the month of May 1910, which was the month used by Mr. Hillman in his calculation. I want to ask you whether or not that year 1910 was a fair average of the year's operations of the railroad from a financial standpoint up to that time?

203 A. The year 1910 was somewhat, you might say, a banner year, being about the best year from 1906 to 1910 inclusive in the way of net results.

R. Q. 29. Would it be fair in your judgment to take the results of the year 1910 as a basis upon which to pass on any rate question in which the railroad Company was involved.

A. I believe it would be a fairer proposition to work up a statement of that kind somewhat on the order of the Interstate Commerce Commission statement, where they seem to take a series of 5 or even 10 years. I believe in this case it would have been fairer to have taken a period from 1906 to 1910, than to take one year itself.

R. Q. 30. The Attorney General in his question this morning asked something about the revenues of this Company for 1911 and 1912, especially the year ended June 30, 1912, in which it appeared that the gross revenues of the Company had exceeded the year before, or the year 1910, by \$4,000,000. I will be glad if you will state what is the result to the Company in the year 1912 as compared with the year 1910 in net revenue.

A. The business of the Company in 1912 was a large traffic, keeping pace with the investment of capital, which had increased considerably in those two years, and showing a total operating revenue for the year ended June 30, 1912, of \$39,735,237.05, as compared with year 1910 of \$35,053,870.42, an increase in transportation revenue of \$4,681,366.63, this increase being about 13%.

204 On the other hand the operating expenses for 1912 were \$25,659,439.87, as compared with operating expenses for the year 1910, of \$21,046,359.69, an increase of 22%. So that for the two years the net earnings were almost identical in spite of the fact that the gross earnings for 1912 had increased over 1910 by \$4,000,000.00, indicating that the expenses increased at a greater percentage than the gross earnings.

R. Q. 31. In other words, for the year 1912 you did four million dollars of business over and above the business of 1910, but out of

which business you received no additional net profit over the profit that was received in 1910 derived from \$4,000,000 less business?

A. 31. That is right.

R. Q. 32. What was this condition due to?

A. Due to the general increase in cost during that period, especially in the question of labor, which is perennial in its demands.

R. Q. 33. That increased cost still continues, does it not?

A. It seems to be an endless procession.

R. Q. 34. Is it, or is it not a fact that the cost of labor has increased since the end of the fiscal year 1912?

A. Yes, sir; there have been recent demands for additional rates of pay, and I think only recently conferences have been held on the subject.

R. Q. 35. What was the result of the conference?

A. As a rule they meet the demands of the labor organizations.

R. Q. 36. That is all in the way of re-direct examination on your cross examination.

Recross-examination.

By Mr. CONLEY:

R. X Q. 1. Mr. Cox, will you file as a part of your deposition page 7, and the top of page 8 down to the words "Capital Stock" of your printed annual report for the year ended June 30, 1911, and mark the same "Exhibit J. W. C. No. 7?"

A. I will.

R. X Q. 2. Will you also file with aa a part of your deposition and mark it "J. W. C. No. 8," printed pages 8 and 9 of the annual report for the year ended June 30, 1912?

A. I will arrange to file such exhibit and mark the same accordingly.

R. X Q. 3. Mr. Cox, in referring to Exhibit No. J-1, just filed by you under the head of Revenue for Passengers only for the year 1907, 1908 and 1909, I note you have used the same figures for each year under this heading as the apportionment of the valuation of the railway company to West Virginia on which you base your calculation for Passenger Revenue. Will you tell me why you used the \$1,391,902.31 for each of these years?

A. I have no especial reason other than to meet the desire of our legal department. As I recall it was at the suggestion of our
206 General Solicitor, that having determined the capital for the first year, he would simply use it, as per the basis of his bill, for the other years on the ground that the capital would probably not be any less, and might probably increase, and it would simply be a method of avoiding any complications or discussions as to a fluctuation of capital.

R. X Q. 4. It seems that you base your calculations upon the percentage of earnings and expenses. Why do you not change this capitalization?

A. In each of these exhibits you will find that where I bring in

by-products and miscellaneous income that I do fluctuate the capital with the earnings, my idea being that the division or distribution of capital would be on the basis of earnings.

R. X Q. 5. I am speaking of valuation under the revenue from passengers only. What inherent virtue have the figures used there for the year 1907?

A. In that year the assessed value, as I recall it, was divided and the percentage proportioned which the earnings from purely passengers bore to the entire earnings in the state, and that was applied to the assessed value to get the proportion accruing to the year 1907.

R. X Q. 6. What inherent virtue has the per cent in the year 1907 that made it a correct criterion in your subsequent calculation as to the value of the property allotted to passenger business in West Virginia?

A. I can only say, as I have stated before, that that value 207 was the value fixed in 1907, and our General Solicitor in getting up his bill, took the position that it would simplify the situation to consider the capital at least as remaining as it was, although it would naturally increase; that the capital would be no less but might be more.

R. X Q. 7. Suppose you had started your computation with 1908 or with 1909, what per cent would you have used?

A. I presume if I had made it up on the plan as suggested by our legal department I would have adopted the same general rule that I did in 1907.

R. X Q. 8. Then you would have a different value depending upon the year of commencement and would carry it through the following years indefinitely?

A. If you divided it invariably on the earnings the capital would likely fluctuate from year to year.

R. X Q. 9. Did you not start, Mr. Cox, with the year 1907, on the earnings basis and then fail to change it when the basis of earnings changed for the years 1908 and 1909?

A. We simply continued the same valuation all the way through.

R. X Q. 10. Notwithstanding the fact that the earnings were different?

A. Yes, sir, notwithstanding the earnings were different.

Q. Well, I will ask you again, what particular value or virtue has the year 1907 over other years?

208 A. I will answer again that simply 1907 shows that we got one return, in 1908 we got a different return. In 1907 the three cent rate was in effect and in 1908 and 1909, as I recall it, or of all of 1909 certainly, a different rate was in effect.

R. X Q. 12. Your percentage was down in 1908 and 1909, and you kept your capitalization the same. If you were basing your capitalization on percentage earnings, why did you not reduce your capitalization?

A. Well, simply on the ground, as I have said, taken by Mr. Reath, our General Solicitor, that we would avoid any question if the capital remained the same.

R. X Q. 13. Mr. Coxe, is it not a fact that the capitalization should never be based upon earnings?

A. I should say that in the division of capital the earning basis has been generally adopted.

R. X Q. 14. Mr. Coxe, you said a while ago on redirect examination that it is essential in practical accounting to have an easily used percentage provided the facts will sustain it generally?

A. Yes.

R. X Q. 15. Then all rate cases are to be dependent on the road's convenience in the use of percentages, is it?

A. No, what I meant to say was, that if that percentage had been 75 and 25 or 76 and 24 I would not have felt I was exactly in the realm of reason to use 20 per cent. and eighty per cent., but where I got, say, 19 or 18 per cent. I would not be without the realm of reason to use 20 per cent.

209 R. X Q. 16. How would it be if it were 84 and 16 per cent?

A. 84 and 16 I think would be probably a little extreme as compared with 80 and 20.

R. X Q. 17. Mr. Coxe, you stated also on your redirect examination awhile ago, that, in your judgment the engine mileage is a better factor than either car or train mileage for the division between freight and passenger?

A. I do not think I made reference to car mileage. I may have stated that I considered engine mileage a better percentage in the case of the Norfolk & Western than train miles on account of the character of our country through which we run, so much of our freight being double headers.

R. X Q. 18. My recollection is, Mr. Coxe, that the question did not refer to train miles, but did refer to both car and engine miles.

A. Well, I may have misunderstood it, but my reply would be the same, that I consider engine miles that we use the better factor.

R. X Q. 19. Has not the Interstate Commerce Commission divided the primary accounts of railway companies into 116 in number?

A. That is my recollection.

R. X Q. Then why is the engine mileage a better basis for each of those separate primary accounts, where they are joint, than the factor which bears directly on each of those 116 primary
210 accounts?

A. Well, I figure that the engine is a fair unit of expense of operation in the way of cost and the resulting earnings from those mileages of engines; and while there may be a greater or less degree of refinement in going into detail I believe in general results that the engine mile is a closer approximate determination of the separation, and that the unit is one which is easily arrived at.

R. X Q. 21. Then you use that factor because it is the easiest?

A. Not alone because it is the easiest, but because I believe it is a satisfactory general result.

R. X Q. 22. Mr. Coxe, in referring to the passenger engine mile percentages, and the particular engine mile percentages for the year 1907, you gave for passengers 17.2 per cent. and freight 82.8 per

cent; for the year 1908, passenger 19.72 per cent. and freight 80.28 per cent; and for the year 1909, passenger 18.76 and freight 81.24 per cent. How did you bring over to the Kenova division the situation to make the above figures?

A. That was the actual engine mileage on the Kenova district.

R. X Q. 23. Did you apportion the Shenandoah and Radford Divisions on the same basis?

A. Well, the Shenandoah and Radford Divisions were apportioned whereas the Kenova division was the actual result.

R. X Q. 24. On what basis are — prorated?

A. The Kenova Division was actual engine mileage, but on the Shenandoah and Pocahontas divisions it was pro rated.

R. X Q. 25. Based on what?

A. Based on the miles of road of the division in each state.

R. X Q. 26. And the same is true of the Pocahontas and Radford divisions?

A. Yes, sir.

R. X Q. 27. How is it, Mr. Cox, that for passenger it drops from 18.78 in 1909 to 16.23 per cent in 1910, as we checked with you yesterday?

A. I can only reply to that in a general way on the assumption that in the expenditure of capital freight traffic was probably developed a little more rapidly than passenger business. That is just a general assumption. I have not gone into it, but I say that might account for that fluctuation.

R. X Q. 28. You said a while ago that the expense of doing business on branch lines is far greater than for doing business on the main line. Can you give the figures?

A. No, sir. Just in a general way I say I know that. We keep no statement of expenses of individual branch lines, and my remarks in that particular were simply from the general belief that the operation of branch lines is naturally more expensive—doing more or less package business, you have got to run your trains, and yet you are not getting the full benefit of them; you have to have your cars and train crews for the business anyhow, whether it is there or not. It is different perhaps from main line business where you are using all of your equipment in the way of engines and cars and getting better results.

R. X Q. 29. But you can not give us any figures on that?

A. I have no figures for any branch line operation.

R. X Q. 30. I believe you stated that your lake coal rates were exceedingly low, in fact, the lowest of any road in the country. Is that correct?

A. The amount received by us for the transportation of lake coal I think is generally conceded to be one of the lowest rates in existence.

R. X Q. 31. How is your coal rate for other shipments interstate; or for instance, to the Eastern Seaboard?

A. To the Eastern Seaboard I should say it was what you might term a low rate.

R. X Q. 32. How about your coal rate for intra-state West Virginia shipments?

A. Those are naturally fairly high rate.

R. X Q. 33. Can you give them?

A. I have not the rates at hand now. I can furnish the data later if desired.

R. X Q. 34. They are much higher than the inter-state rate?

A. Naturally they are much higher rates.

213 R. X Q. 35. You stated on your redirect examination that 57 per cent of the pounds of intra-state freight were interchanged between branch and main lines. Will you tell me how much was on the branch lines, and how much was on the main line?

A. The car-load traffic from branch lines to branch lines via the main line, that is where the business originated on a branch line and goes to the main line and comes back on a branch line—was 830,030 pounds, and less than car-load was 41,520 pounds.

R. X Q. 35. Are you able to give us now how much of this interchange freight accrued on the branch lines and how much accrued on the main line, expressed in pound miles?

A. I have not that information.

R. X Q. 36. Are you also unable to give the same information as to the inter-state business?

A. I only have the data here in pounds and not in pound miles.

R. X Q. 37. Have you included in your branch line movement of coal the concentrating cost and mileage?

A. I have not.

R. X Q. 38. That is all.

Signature waived by agreement of counsel.

GEO. L. HART,
Notary Public.

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Complainant's Rebuttal Evidence.

The Complainant introduces Joseph W. Coxe as a witness for the purpose of interrogating him in rebuttal on the exhibits filed by C. W. Hillman, an expert witness introduced and examined on behalf of the defendant, the State of West Virginia.

JOSEPH W. COXE, for Complainant, in Rebuttal.

Direct examination.

By Mr. COCKE:

D. Q. 1. Mr. Coxe, I will be glad if you will turn to Mr. Hillman's exhibit No. 6. In this exhibit I understand that he undertook to find out how much of the revenues which are derived from intrastate passenger business in West Virginia are consumed in expenses and taxes. I think the result of his conclusion is that 97.4203 per cent of those earnings are consumed in paying taxes and expenses incident to earning the revenue. In the analysis of Mr. Hillman's

exhibit it appears that he puts in excess baggage, mail and express as a part of the revenue derived from the passenger business, and undertakes to divide that revenue between inter-state and intra-state on the basis of the expenses of doing the respective classes of business. I will be glad if you would state whether or not in your judgment the basis of division used by Mr. Hillman for this purpose is
215 the correct basis of division, and if it is not, please state what in your judgment is the correct basis for a division of the revenue derived from these byproducts.

A. Mr. Hillman's exhibit No. 6 is based upon the earnings of the line between Bluefield and Kenova for the months of November, 1909, and May, 1910, and he embraces as a part of the passenger earnings for the line between Bluefield and Williamson excess baggage, mail, and express, and other passenger train earnings, aggregating for these two months \$17,764.06, of which he allots to the line in West Virginia a percentage proportion based on mileage of 94.4%, or \$16,769.27, and attributes to the intrastate passenger traffic 52.9204%, or \$8,875.87. On the line from Williamson to Kenova he similarly takes this same class of earnings, aggregating \$8,246.21, and gives to the line in West Virginia 58.8344%, or \$4,851.61.

The items objected to in this exhibit are the allotments of other passenger train revenue as distributed by Mr. Hillman on the basis of intrastate and interstate passenger expenses. Reference to Mr. Hillman's exhibit No. 3 shows the total passenger expenses for the Pocahontas District for November, 1909, and May, 1910, as \$73,390.42; and Mr. Hillman's exhibit No. 4 shows intrastate passenger expenses as being \$38,845.10, the \$38,845.10 being used as the numerator, and \$73,390.42 as the denominator, pro-
216 duces an expense per centage of 52.9294 per cent.

Mr. Hillman accordingly takes the items of "Other Passenger Train Revenue" on the Pocahontas district for November, 1909, and May, 1910, aggregating \$17,764.06, of which 94.4% represents the mileage of the line Bluefield to Williamson, W. Va., and produces \$16,769.27.

Of this last named amount of \$16,769.27, Mr. Hillman allots to intra-state passenger earnings 52.9294 per cent, as shown above and produces as the intra-state allotment of other passenger train revenue on the Pocahontas district, \$8,875.87.

Similarly on the Kenova district, Williamson to Kenova, Mr. Hillman takes the other items of passenger train revenue, aggregating for the months of November, 1909, and May, 1910, \$8,246.21. Mr. Hillman subdivides this amount, \$8,246.21, between intra-state and inter-state on the basis of passenger operating expenses as shown in his exhibit No. 3. Total passenger operating expenses, Kenova to Williamson, \$32,395.57. Intra-state passenger expenses, as per Mr. Hillman's exhibit No. 4, \$19,059.72, or 58.8344 per cent. \$8,246.21 multiplied by 58.8344 per cent produces the proportion credited by Mr. Hillman to intra-state passenger earnings, Williamson to Kenova, \$4,851.61.

So that the total intra-state "Other Items of Passenger train

earnings" as used by Mr. Hillman are, for the Pocahontas district, \$8,875.87, and for the Kenova district \$4,851.61, a total of \$13,727.48. The method adopted by Mr. Hillman of distributing the "Other Items of Passenger Train Revenue" on the basis of expenses is objected to, and the suggestion made that the more appropriate method of distribution is on basis of intra-state passenger revenue and inter-state passenger revenue. Mr. Hillman's exhibit No. 4-A shows all passenger revenue (passenger only) for the Pocahontas district for November, 1909, \$31,805.91, for the Kenova district \$15,664.68; and for May, 1910, Pocahontas district, \$37,677.45, and Kenova district \$17,042.64, and aggregate for the Pocahontas district for November and May of \$69,483.36, and for the Kenova district for November and May, \$32,707.32. Whereas the intra-state passenger revenues (passenger only) for November, 1909, and May, 1910, Pocahontas district were \$31,109.86, so that percentage of intra-state passenger revenue on Pocahontas district to the total passenger earnings from the transportation of passengers exclusively is 44.7 per cent, and on the Kenova district the intra-passenger revenue, November, 1909, and May, 1910, was \$17,285.91, or percentage of intra-state revenue 52.85.

Therefore the proportion of "Other Items of Passenger Train Revenue for November, 1909, and May, 1910," to be credited to intra-state passenger earnings, should be Pocahontas district \$16,769.27 multiplied by 44.7 per cent, which would produce \$7,507.60; and on the Kenova district \$8,246.21 multiplied by 52.85 per cent, which would produce \$4,358.12, making a total for the two months of other items of passenger train revenue of \$11,865.72, as compared with distribution made on basis of expenses by Mr. Hillman of \$13,727.48.

Mr. Hillman's exhibit No. 6, intra-state passenger statement, for May, 1910, and November, 1909, Norfolk & Western Railway, should be revised to read as follows:

Passenger Revenue (Passengers only) Pocahontas district	\$31,109.86
Kenova District	17,285.91

"Other Passenger Train Revenue": .

Total \$17,764.06 for Pocahontas District, West Va., 94.4%, \$16,769.27 x 44.7% Revenue Basis	7,507.60
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Total Kenova to Williamson, all West Virginia, \$8,246.21 x 52.85% Revenue Basis.....	4,358.12
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\$60,261.49

Expenses as per Hillman Exhibit #4 \$57,904.83

Removal of Snow, Sand and Ice:

Pocahontas District	79.70
Kenova "	23.34
	<hr/>
	\$58,007.87

Operating Percentage	96.2602%
Taxes	4.0449

Operating Expenses and Taxes	100.3051%
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D. Q. 2. As I understand, Mr. Coxe, as the result of your analysis of Mr. Hillman's exhibit in the event that he would adopt the basis of intra-state and inter-state passenger revenue for the division of the revenue derived from the by-products rather than the passenger expenses, then the cost to earn a dollar of passenger revenue, instead of amounting to 97.4203 per cent. would be 100.3051 per cent?

A. That is the case.

D. Q. 3. Now, with reference to this mode of ascertaining, or dividing up the revenue from by products has there been any general consensus of opinion among railroad accountants as to how that should be divided up?

A. I think there has been a general consensus of opinion that the mail, express and baggage follow the earnings of passengers, and I do not know of any other worker in this line who has adopted the expense basis; such a thing may have been done, but I have never heard of it.

D. Q. 4. You have never heard of any one except Mr. Hillman?

A. Yes. I will not say there is no other, but I know in many cases where earnings basis has been adopted, especially in court cases, so that I would say that the earnings basis would be almost the invariable rule.

D. Q. 5. Can you mention some railroad in which this mode of distributing this revenue from by-products is on the basis which you have suggested as the proper basis?

A. I recall a recent conference of a number of leading railroads of the country, and as an indication that the revenue basis is the more generally adopted and more appropriate method, reference is made to a series of recommendations adopted by a committee of accounting officers held at Chicago, October 3, 1912, in connection with the express investigation now before the Interstate Commerce Commission, in which it is suggested that any items of revenue, common to both classes of service, shall be divided on the percentage obtained by the combining of all other allocated items. The roads participating in this conference were some of the most prominent in the west:

Chicago, Burlington & Quincy R. R.
 Chicago & Northwestern R. R.
 Illinois Central R. R.
 Southern Ry.
 Louisville & Nashville R. R.
 Chicago, Rock Island and Pacific R. R.
 Baltimore & Ohio R. R.
 A. T. & S. F. R. R.
 Chicago, Milwaukee & St. Paul R. R.
 Northern Pacific R. R.
 Denver & Rio Grande R. R.
 Great Northern R. R.

D. Q. 6. Now, Mr. Coxe, I would ask you to turn to Mr. Hillman's exhibit No. 5. In this exhibit Mr. Hillman undertakes to ascertain the cost of doing intrastate freight business in West Virginia. I will ask you as a preliminary question whether you have ever been able to ascertain the cost of doing intra-state freight business in connection with any investigations you have taken part in concerning freight matters before the Interstate Commerce Commission, or before any of the State Corporation Commissions?

A. I do not recall any endeavor to formulate any plan of establishing the cost of intra-state freight business other than on the general plan of dividing the expenses on the basis of earnings.

D. Q. 7. In making up statements it has been conceded
 221 by every expert or other person connected with traffic affairs in this country that intra-state freight business is done at an excess cost over the entire freight business, is it not?

A. That is the generally accepted proposition.

D. Q. 8. Mr. Hillman states that there are two elements of this extra cost: One due to the fact that the intra-state business is subject to two terminal charges; and, secondly, that in this particular case it appears that the mileage of intra-state business is on an average of 25 miles, while inter-state business is on an average of 75 miles, and that hence it is only one-third of the haul over which to distribute the terminal charges, and based on these two elements of excess cost he proceeds to find out the cost of doing the freight business, and then expands the items on the theory that if all the business was done at the excess cost of intra-state business, then the cost would be expanded by the several amounts which he attaches to the items. I will ask you now, whether, in your judgment, the theory of ascertaining the cost of doing intra-state business in West Virginia, as exploited by Mr. Hillman in his exhibit No. 5, is in your judgment a safe mode of basing a conclusion as to the cost of doing intra-state freight business in West Virginia?

A. I would say in a general way that I believe Mr. Hillman's exhibit No. 5 fails to meet the situation owing probably to lack of
 222 information possessed by him when debating that point and in drawing up his form, and studying all the prominent features of the traffic on this part of the line impresses me with the fact that he has failed to size up the situation. Among the prominent points in connection with this business, I refer to

the month of May, 1910, as Mr. Hillman's exhibit is based on the figures in that month, and I think the month of November, 1909.

The intra-state business for the month of May, 1910, representing 13,046 tons was out of an aggregate of one million, five hundred, eighty-one thousand, five hundred and seventy-two tons, the intra-state business forming 0.82% of the entire number of tons handled on the line from Bluefield to Williamson.

Of the total number of intra-state tons of coal and coke, representing 4,108 tons, or 31.48 per cent, there went along with it merchandise amounting to 8938 tons, or a percentage of 68.52 per cent.

The total inter-state tonnage was 1,568,526, of which coal and coke represented 88.29 per cent. and merchandise represented 11.71 per cent.

As I think I have previously mentioned here, out of the entire tonnage mileage, Bluefield to Williamson, intra-state and inter-state, tons one mile, coal and coke represent 83 per cent.

The average haul for May was coal intra-state five miles, inter-state 46 miles; of the coke there was no intra-state traffic, and the average haul of coke inter-state was 66 miles. The average haul of merchandise intra-state was 29, and inter-state 75 miles.

The total intra-state tons one mile for the month of May was 280,710, while the total tonnage mileage was 82,905,813; the intra-state tonnage mileage representing 0.34 per cent.

Mr. Hillman's exhibit No. 5 purports to show the cost of doing intra-state freight traffic based upon freight expenses on the Pocahontas district as shown in his exhibit No. 2, which, for the months of May, 1910, and November, 1909, brought together on Mr. Hillman's exhibit No. 5, as \$550,779.20, and which Mr. Hillman expands to what he terms cost on basis of intra-state conditions, to \$999,384.07.

The aggregate tonnage mileage on the Pocahontas district for November, 1909, and May, 1910, was 170,625,446. Mr. Hillman therefore shows that \$999,384.07 divided by the tonnage mileage, 170,625,446, produces an average cost per ton per mile for intra-state freight of 5.8572 mills, whilst the actual average cost was \$550,779.20, divided by the aggregate tonnage mileage 170,625,446, or 3.23 mills.

This aggregate tonnage mileage is composed of, November, 1909, 87,719,633, and May, 1910, 82,905,813, a total of 170,625,446, of which coal and coke represents 142,369,416, or 83.5 per cent., leaving for merchandise 28,256,030, or 16.5 per cent.

Taking the month of May, 1910, as an illustration, the analysis shows that the intrastate business was represented by coal, 4,108 tons, and merchandise, 8,938 tons; that interstate traffic was composed of coal, 1,156,655 tons, coke 228,110 tons, merchandise 183,761 tons, a grand total of 1,581,572 tons; so that intrastate business out of this tonnage only represents 0.82%, whilst interstate traffic represents 99.18%.

Or, taking the tonnage mileage for May, 1910, the coal tonnage mileage on intrastate was 20,214 tons one mile, and interstate 53,-

699,162 tons one mile, making a total intrastate and interstate tonnage of 53,719,376 tons one mile of coal. There was no movement of coke intrastate, but coke interstate amounted to 15,052,293 tons one mile, and merchandise interstate amounted to 13,873,648 tons one mile, whilst the merchandise intrastate tons one mile was only 260,496. So that the entire tonnage mileage for the month of May, intrastate and interstate, was, intrastate 0.34%, and interstate 99.66%.

The average hauls are:

	Intrastate.	Interstate.
Coal	5 miles	46 miles
Coke	29	66 "
Merchandise	29 "	75 "

Taking the merchandise traffic alone for May, 1910, and eliminating for the time being the coal and coke, the percentage of traffic interchanged with branch lines was:

Intrastate merchandise	57%
Interstate merchandise	5%

In connection with the interstate merchandise traffic for 225 May, 1910,

Car load	359,387,043 pounds
Less car load	8,243,901 "
of the car load shipments, aggregating	359,387,043 lbs.
there originated and terminated beyond Bluefield	
and Williamson	317,250,000 "

With these facts it is evident that the Inter-state traffic was an unusually homogeneous one and the *the* expenses used in Mr. Hillman's exhibit #5 as the actual total freight expenses for November, 1909, and May, 1910, \$550,779.20, represented results based upon unusual conditions in the way of maximum results with minimum expenses. Had the same aggregate tonnage mileage accrued under

Intrastate conditions with the average hauls on coal	5 miles,
Merchandise	29 "

the number of tons would have increased to such an extent as to have rendered necessary a vast increase in plant, both as to equipment and yards. Train crews would have multiplied probably six times, with a vital increase in loss of car efficiency incident to short hauls, because so much more time would be consumed in cars standing to be loaded or unloaded as against moving a longer distance with one load.

Hillman Exhibit #5 underrates the cost of handling the business under Intra-state Conditions when it fails to expand these features in treatment of M. E. Account

25, Steam Locomotive Repairs, Road:

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34, Freight Train Car Repairs	
35, " " " Renewals and Depreciation;	
Conducting Transportation Account	80, Road Enginment
	81, Enginehouse expenses— Road;
	82, Fuel for Road Locomo- tives;
	83, Water for Road Locomo- tives.
	84, Lubricants Road loco- motives.
Conducting Transp't'n Account. . . .	85, Other supplies for Road Locomotives;
	88, Road Trainmen;
	89, Train Supplies and Ex- penses.

But allows them to remain as based upon a phenominally homo-
geneous movement indident to the Coal, Coke and Car-load Mer-
chandise movement.

D. Q. 9. Then, as I understand, Mr. Coxe, according to the
answer you have just given the supposed case made by Mr. Hillman
and which results in his expansion of certain items of cost in order to
ascertain the cost of doing intra-state business, is peculiarly and
singularly inapplicable to the conditions in West Virginia under
which the traffic of the Norfolk & Western Railway is conducted.
Am I right in the assumption contained in this question?

A. I should say so. It strikes me to replace that tonnage mileage
on all that inter-state merchandise and coal, with similar tonnage
mileage of freight handled under intra-state conditions, could hardly
be conceived of in West Virginia.

227 D. Q. 10. If you were to do the West Virginia business
which is now done under inter-state conditions, or try to per-
form that service, under intra-state conditions on the basis that Mr.
Hillman makes in his deposition, it would be attempting something
that is impossible, would it not?

A. That is the way I feel about it.

D. Q. 11. Have you been able to get your mind to consent to the
proposition advanced by Mr. Hillman that the excess cost of doing
intra-state freight business in West Virginia is measured by the
increase over general cost which he sets up in the exhibit which he
has filed, setting forth what in his judgment that intra-state freight
cost is?

A. The impression made upon me in studying his exhibit is that
Mr. Hillman has failed to consider properly the conditions surround-
ing this particular traffic in West Virginia; and that with that failure
he has failed to properly expand his expenses on those items that he
allows to remain undisturbed.

D. Q. 12. Now, without admitting the reasonableness or propriety

of Mr. Hillman's ascertainment of the cost, I will be glad to know whether you have made any estimate of what the cost of doing intra-state business in West Virginia would be on Mr. Hillman's theory; that is, in the event he had expanded the items of cost which he permitted to remain the same, in the same way in which he expanded the items which were expanded by him. If you have such an estimate as that, I will be glad if you will file the exhibit showing what it is and state what the result is?

A. I have taken the items which Mr. Hillman failed to expand, and have simply expanded them on the minimum expansion I could conceive of, which was the relative comparison of the haul.

Had Mr. Hillman expanded the actual costs of the following primary accounts as it is felt, under the conditions attending the handling of intra-state freight traffic as they exist on this part of the road, he should have done, then it is figured that his expanded costs as per exhibit C. W. H. #5, shown as \$999,384.07 would have been increased as follows:

Acct.	Actual costs.	Expanded costs.
25-Steam Locomotive Repairs.....	\$61,000.00	\$120,000.00
34-Freight Train Car Repairs.....	52,588.03	157,764.15
35-R " " Renewals.....	3,226.44	9,679.32
36- " " Depreciation..	20,201.05	60,603.15
80-Road Enginemen.....	65,141.63	195,424.89
81-Enginehouse Expenses—Road...	10,020.18	30,060.54
82-Fuel for Road Locomotives.....	59,946.19	179,838.57
83-Water " " ".....	3,336.27	10,008.81
84-Lubricants " ".....	1,140.01	3,420.03
85-Other Supplies for Road Lo.....	1,622.03	4,866.09
88-Road Trainmen.....	54,033.05	162,099.15
89-Train Supplies & Expenses.....	2,960.46	8,881.38
	<hr/>	<hr/>
	\$335,215.34	\$942,646.08

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Forwarded	\$333,215.34	\$942,646.08
		<hr/> 335,215.34

		<hr/>
		\$999,384.07
Additional charges to be added.....		<hr/> 607,430.74

Total freight expenses adjusted to intrastate conditions.....		<hr/> 1,606,814.81
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The additional expense aggregating \$606,430.74 are based upon the shorter haul of the intra-state traffic.

The expanded charges of \$1,606,814.81 divided by the total tonnage mileage of November, 1909, and May 1910, 170,625,446:

\$1,606,814.81

<hr/> 170,625,446	= Average cost of handling intra-state traffic per ton mile 9.4172 mills, as compared with Mr. Hillman's original estimate of 5.8572 mills.
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D. Q. 13. Mr. Coxe, I now ask you to turn to Mr. Hillman's Exhibit No. 7. In this exhibit, as I understand Mr. Hillman undertakes to ascertain the cost of doing both freight and passenger intra-state business in West Virginia, and for this purpose he combines
 230 the cost figures that he sets forth in Exhibit No. 5, which was intra-state freight business, and the figures ascertained by him in Exhibit No. 6, in which he undertakes to ascertain the cost of doing intra-state passenger business. The result of his Exhibit No. 7 is that all the business in West Virginia, intra-state freight and passenger, is shown to be done at an expense of 71.9553%, to which he adds 23.013% as an allowance for interest, dividends, etc., aggregating 94.9583%, which is the percentage as he claims of the cost of doing business in West Virginia combining inter-state and intra-state. You have already discussed his own theory, and have added what, in your judgment, a reasonable correction in regard to the cost would be, using his own theory as a basis for the correction. I now ask you to file and exhibit showing what the combined cost of these two classes of business in West Virginia, freight and passenger, would be as shown by the corrections which you think are reasonable to be made from Mr. Hillman's figures, using his own theory as a basis of calculation.

A. Mr. Hillman's exhibit No. 7 purports to show the cost of earning \$53,653.12 of Gross Revenue on intra-state passenger and freight traffic in West Virginia in May, 1910, and he produces a per centage cost of 71.9553%.

One of the component items of this cost is the expense of intra state freight traffic, \$3,873.00, which is objected to, as explained in the criticism of Mr. Hillman's Exhibit No. 5. There is also included in this statement of Mr. Hillman's the items for passenger revenue on the Pocahontas District intra-state for May
 231 \$4,654.85, and the Kenova division intra-state for May \$2,514.90, which Mr. Hillman obtained by applying to the total "Other Passenger Revenue" the percentages based upon expenses as criticised in his exhibit No. 6.

Pocahontas District, other items of passenger train
 revenue, \$8,794.79 x 52.9294% \$4,654.85

It is claimed this amount of \$8,794.79 should be divided between intra and inter-state on basis of passenger revenue from intra and inter-state: thus, on the Pocahontas District for May, 1910:

Intra-state Passenger Revenue (Passenger only)	\$17,672.18—46.904%
Total	37,677.45
Therefore, the "Other items of Passenger train revenue	8,794.79
46.904%—other items of Passenger Train Revenue, intra-state	4,125.10

232 Similarly on the Kenova District: May 1910.

Intra-state Passenger Revenue (Passengers only)	\$9,203.59—54.003%
Total	17,042.64

Therefore the total "Other items of Passenger Train Revenue," May, 1910, Kenova District (as shown in criticism of Hillman Exhibit #6) \$4,274.54 x 54.003%—Intra state Other items of Passenger Revenue

\$2,308.38

With those corrections made, Mr. Hillman's exhibit #7 would read; May, 1910:

Intra-state Passenger Revenue, Pocahontas	
Dist.	\$17,672.18
Other	4,125.10
Intra-state	
Kenova Dist.	9,203.59
Other	2,308.38
Intra-state freight Revenue, West Virginia, May, 1910	19,365.00
Other Operating Revenue, Pocahontas and Kenova districts	242.60
Total Intra-state Earnings, May, 1910	\$52,916.85
Passenger Operating Expenses for May, 1910, Pocahontas District, as per Hillman Exhibit #3	32,116.66
Freight Operating Expenses as worked by Mr. Hillman in Exhibit- #5 and 7	3,873.00
Taxes	2,616.66
	38,606.32

233 Percentage of Cost

72.957%

On page 61 of Record, Mr. Hillman refers to examination of 14th Annual Report of the N. & W. Ry. for June, 1910, and shows that Interest Rates, Hire of Equipment, Rents of Tracks, Yards & Terminals and Dividends at 5% on Common Stock and 4% on Preferred, and excluding taxes, considered above, would consume of the Gross Operating Revenue

23.013#

95.970%

And on page 135 of Record, states that if 6% had been allowed on Common Stock there would be added

1.877

97.847%

Taking a period of 5 years, 1903-1910, inc., the proportion of Gross Operating Revenue necessary to allow 6% on Common Stock and pay the Interest charges, Rents, etc., specified above, would be.....	28.800%
Which added to the revised percentage cited above..	72.957
	<hr/>
	101,757%

with no provision for expenditures for Additions and Betterments.

234 On sheet #1 Exhibit L-1 of this criticism of Mr. Hillman's Exhibit #7, is shown the original percentage of operating revenue consumed by operating expenses on Passenger and Freight Traffic in West Virginia:

Total Intra-state expenses and taxes as originally figured by Mr. Hilman	\$38,606.32	
	<hr/>	= 71.9553%
Total intra-state Earnings	\$53,653.12	

On sheet #2 is shown what this percentage would be if the method is adopted of distributing the item of "Other Passenger Train Earnings" on basis of Revenue from Intra and Inter-state Passengers, and using Mr. Hillman's Cost of handling Intra-state freight traffic under intra-state conditions as figured in his Exhibit #5:

Total Intra-state Expenses and Taxes....	\$38,606.32	
" " " Earnings	\$52,916.85	= 72.957%

Under the revision of Hillman Exhibit #5 as revised by J. W. C., the expanded freight expenses show a cost per ton per mile on Intra-state Freight of..... 9.4172 mills
And applying this to the West Virginia Intra-state tons—one-mile for May, 1910; 650,968 x 9.4172 mills, we have as the cost..... \$6,215.05

Instead of the amount as shown by Mr. Hillman of	\$3,873.00	
Adding the intra-state Passenger expenses as per Hillman Exhibit #3.....	32,116.66	
Taxes	2,616.66	
	<hr/>	

235 Total Operating Expenses and Taxes on Intra-state Traffic, Passenger and Freight..... \$40,948.37

Gross Earnings, intra-state, Passenger and freight..... 52,916.85

Therefore: $\frac{\$40,948.57}{\$52,916.85}$ = Percentage of Operating Expenses and Taxes.....	77.382%
--	---------

On page 61 of Record of March, 1912, depositions, Mr. Hillman refers to the percentage of Gross Revenues for year ending 6-30-1910 consumed by Interest, Rents, Hire of Equipment, Rents of Tracks, Yards and Terminals, and Dividends at 4% on preferred and 5% on Common (and excluding Taxes previously considered)

23.013

 100.395%

And on page 136 of Record, states that if 6% Dividend had been allowed on Common Stock, there should be added

1.877

 102.272%

which means that the Intra-state Passenger and Freight traffic, to earn its operating expenses, taxes and its share of the Interest on Bonds and Stock, would cost \$1.02272 to earn \$1.00, and which no provision for that class of Additions and Betterments which should be provided from Income rather than be capitalized.

236 D. Q. 14. The result of your analysis and correction of Mr. Hillman's exhibit No. 7 is that if the Common Stock of your Company is allowed to return five per cent. on this class of business, then, even under Mr. Hillman's theory of accounting more than 100 per cent of the earnings, and that is to say, to be more accurate, 100.395% of the earnings would be consumed. In other words, the earnings would fail to provide for the expenses and pay five per cent. on the Common stock by .395 per cent?

A. Yes, sir.

D. Q. 15. In the event, however, that it was deemed reasonable that an investor in the stock of a railroad company should have a return of six per cent. on his investment then the earnings from West Virginia intra-state business would fail to earn for such stock holder six per cent. by 2.272%, is that right?

A. Yes, sir.

D. Q. 16. In addition, in each case, there would, under this system of accounting, be no allowance made for additions and betterments, or the accumulation of a surplus by the railway company to tide over disasters or lean years, is that a fact?

A. That is a fact. No allowance whatever would be made for additions and betterments, which should be paid for out of income.

D. Q. 17. My understanding is that in making this estimate you did not by so doing in any way endorse the theory that Mr. Hillman has advanced, nor did you admit that he has discovered a formula for the ascertainment of the cost of doing intra-state business,

237 am I right in what my question implies?

A. I should say that your question was about properly stated, and that I feel Mr. Hillman has failed to properly size up the situation.

D. Q. 18. After all, Mr. Coxe, is not Mr. Hillman's statement and calculation based upon the earnings of this company for the year

1910, which, as you have stated in your deposition, was a banner year for the company in the way of earnings, an improper one? And will you not also state whether in your judgment it would be fair to take a year giving the best conditions as a basis to consider a rate proposition, such as the earnings of 1910?

A. No. I would say that for the year 1906 the operating revenue was \$28,000,000, for 1907 \$31,000,000, and 1908 \$29,000,000, and 1909 \$29,000,000, and 1910 \$35,000,000. It will therefore be seen that 1910 was a banner year from 1906 up to that time, and I feel that it is hardly a fair proposition to take a year of that character upon which to base a rate result.

D. Q. 18. That is all I wish to ask Mr. Coxé in rebuttal.

Cross-examination.

By Mr. CONLEY:

X Q. 1. Mr. Coxé, what express company operates over the Norfolk & Western Railway lines?

A. The Southern Express Company.

X Q. 2. Do you report your passenger earnings to that company?

A. Do we report our passenger earnings?

238 X Q. 3. Yes?

A. No, sir.

X Q. 4. Then they do not base their payments to you for express business on your passenger earnings, do they?

A. No, sir. Our contract provides that we shall receive a certain proportion of the gross collections which the express company makes.

X Q. 5. If your passenger earnings should increase, would you get from the United States Government any extra compensation for carrying the mail?

A. If the passenger business should increase?

X Q. 6. Yes.

A. The chances are that if the passenger business should increase the mail business would increase also, and when the weighing of the mail took place we would get the benefit thereof.

X Q. 7. Without any increase in the weight of the mail?

A. No, sir. It would be necessary to have an increase in the weight of the mail in order to get an increase in compensation.

X Q. 8. An increase in the weight of mail would not depend upon an increase in the number of passengers carried, would it?

A. I would say that with the growth of the passenger business the mail business would grow, that one follows the other.

X Q. 9. Do you mean to say by that that you would get more revenue from carrying mail if the passenger rate were three cents than if it were two cents?

239 A. Oh, no. I did not mean to indicate any such idea. But I said with the growth of the passenger business, even at the two cent rate, we might get more mail, because people create mail.

X Q. 10. The price you get for carrying mail is not dependent upon the fares you charge for the transportation of passengers?

A. No, they are two separate propositions.

X Q. 11. That is all.

(And no other questions being asked further this deponent saith not.)

Signature waived by agreement.

GEO. L. HART,
Notary Public.

240

Defendant's Surrebuttal.

C. W. HILLMAN, A witness heretofore introduced in chief on behalf of the defendant, and examined and cross-examined, is recalled for further examination in sur-rebuttal.

By Mr. CONLEY:

D. Q. 1. Mr. Hillman, are you the same gentleman referred to by Mr. Joseph W. Coxe in his testimony just closed?

A. Yes, sir.

D. Q. 2. Have you heard the statement made by Mr. Coxe in criticism of your testimony for the defendant in this case and exhibits filed with your testimony?

A. Yes, sir, I have.

D. Q. 3. What have you to say in answer to those criticisms?

A. In the first place I have to say in answer to his criticisms as to the division of byproducts of the passenger or freight business on the basis of passenger revenue or freight revenue, that it is entirely erroneous; that it is only adopted as a make-shift by railroad companies, and that it has no relation whatever to the amount earned in the handling of these byproducts save perhaps in the single item of station receipts from passengers, where the number of passengers using the facilities would have some effect upon the purchase of tickets or storage of baggage, which is one of the facilities;

241 that the trebling of accounts Nos. 25, 34, 35, 36, 80, 81, 82, 83, 84, 85, 88 and 89 upon my exhibit number 5 is totally erroneous, as these are expenses which accrued per mile moved, and to put them on the basis of per mile moved and then multiply them by three because they did not move the average mileage, would be totally erroneous.

As I stated in my direct testimony, I was unable to obtain the amount from the freight traffic intra-state or inter-state carried upon what is termed local trains, wherein the cost is very much increased over the cost of traffic carried on through trains per ton per mile, and that is confirmed by Mr. Cox in his rebuttal testimony here, when he says he is totally unable to give any figures concerning the amount of mileage of traffic so carried on through trains and local trains, inter-state.

Further than that, in the division of expenses I will state that probably of the various factors, if we should be compelled to use one factor, engine mileage would probably be the best single factor for the division of operating expenses between passenger and freight,

but that there is no one factor which can be used for the division of the joint expenses which accrue upon 116 accounts set up by the Interstate Commerce Commission, and that therefore these accounts must be analyzed and divided between freight and passenger, and between inter-state and intra-state, or whatever business is conducted, upon the basis of the factor which bears directly upon that particular expense. If it were otherwise there would be no consistency or sense in creating 116 expense accounts.

D. Q. 4. That is all.

Cross-examination.

By Mr. COCKE:

X Q. 1. Mr. Hillman, how do you ascertain the capital devoted to intra-state passenger trains?

A. On the basis of expenses.

X Q. 2. What was the capital you ascertained and used in this case?

A. I did not use any capital at all in my analyses. I simply determined the operating expenses.

X Q. 3. Did you ever find out what was the capital, which, according to your theory was used by the Norfolk & Western Railway Company in West Virginia?

A. I made no computation; no, sir. If I should do so I will say that I would take it upon the expense basis.

X Q. 4. I have always understood you put it upon that basis. State precisely how you would ascertain it on the expense basis.

A. I would determine the total value of the property in the state of West Virginia. I would then take the expense account as I have determined, and find the relation of each one of those expense accounts to the total expenses in West Virginia and assign that percentage of the capital to the business in hand.

243 X Q. 5. And you worked on this case for the purpose of coming to a conclusion as to whether or not the two cent rate was a fair and just one to the Norfolk & Western Railway Company without ever ascertaining what was the capital that the Norfolk & Western had invested in this business upon which it was entitled to a return?

A. No, sir; I was not employed to find out whether the rate was just or unjust. I was employed to ascertain what the expenses were for passenger, and what the expenses were for freight, and the taxes the same way. My employment went no further, and I think my testimony went no further than that.

X Q. 6. That is all.

(And no other questions being asked further this deponent saith not.)

Signature of witness waived by agreement of counsel.

244 STATE OF VIRGINIA,
City of Roanoke, To wit:

I, Geo. L. Hart, a Notary Public, in and for the State of Virginia, City of Roanoke, do hereby certify that the foregoing depositions of Joseph W. Coxe, for complainant, and C. W. Hillman, for Defendant, were duly taken at the time and place stated in the caption thereto by agreement of counsel, and for the purpose stated in the caption to the depositions taken on the fourth day of October, 1910, and that the signatures of the witnesses were waived.

Given under my hand and Notarial Seal this third day of February, 1913.

GEO. L. HART,
Notary Public.

My Term of Office Expires December 12, 1916.

By the Laws of Virginia no tax is required upon this seal.

(Here follow pasters, marked pages 245-251.)

EXHIBIT J. W. C. J-1.

NORFOLK AND WESTERN RAILWAY CO.

vs.

W. G. CONLEY, Attorney General of West Virginia, et al.

West Virginia 2-cent Passenger Rate Case.

Summary of Results Shown in Exhibits J. W. C. B-2, C-2, and D-2.

	1907.			1908.			1909.		
	Revenue from pass 'g'ts only.	Including by-products.		Revenue from pass 'g'ts only.	Including by-products.		Revenue from pass 'g'ts only.	Including by-products.	
Gross Passenger Revenue.....	362,997.74	441,311.10		289,943.22	365,022.35		281,864.50	355,505.10	
Operating Expenses and Taxes.....	311,001.83	376,885.38		275,519.79	346,948.19		283,416.62	357,467.12	
Percentage of Ordinary Operating Ex- penses and Taxes.....	85.68%	85.40%		95%	95%				
Net Earnings from Operation.....	51,995.91	64,425.72		14,423.43	18,074.16		D. 1,552.12	D. 1,962.02	
Add Miscellaneous Income.....		557.21			280.46			1,343.91	
Total Income applicable to Capital.	51,995.91	64,982.93		14,423.43	18,354.62			D. 616.11	
Proportion of Bond and Stock Valuation.	1,952,680.00	2,370,180.00		1,744,976.00	2,192,406.00		1,644,415.00	2,074,774.00	
Rate of Return.....	2.66%	2.78%		.81%	.84%				
Proportion of Tax Assessment.....	1,391,902.31	1,689,502.81		1,391,902.21	1,519,000.00		1,391,902.21	1,465,600.00	
Rate of Return.....	3.73%	3.84%		1.04%	1.19%				

(6 copies)

1/31/13

Adjustment of Intra-State Passenger and Freight Expenses on Basis of West Virginia Engine Mileage.

Year Ending June 30th, 1909.

	Passenger.	Freight.	Total.
Total Operating Expenses in West Virginia.....	763,604.24	4,157,764.26	4,921,368.50
\$4,921,368.50 × 35% × 20%	344,495.80	1,377,983.18	1,722,478.98
	419,108.44	2,779,781.08	3,198,889.52
\$1,722,478.98 × 18.73%	323,481.55	1,398,997.43	1,722,478.98
	742,589.99	4,178,778.51	4,921,368.50
\$742,589.99 × 45.19%	335,576.42		
\$742,589.99 × 54.81%	407,013.57		
\$4,178,778.51 × 2.36% Intra.....		98,619.17	
\$4,178,778.51 × 97.64% Inter		4,080,159.34	

Intra-State.

	Passenger.	Freight.	Total.
Intra-state Passenger Expenses originally charged.....	345,053.25	97,919.42	442,972.67
Should be.....	335,576.42	98,619.17	434,195.59
Amount overcharged.....	9,476.83		9,777.08
“ undercharged.....		699.75	
West Va. Intra-state Earnings.....	355,505.10	164,239.21	519,744.31
Less adjusted “ Expenses.....	335,576.42	98,619.17	434,195.59
Net Earnings.....	19,928.68	65,620.04	85,548.72
Less Taxes.....	12,413.87	5,746.16	18,160.03
	7,514.81	59,873.88	67,388.69
Add Miscellaneous Income.....	1,345.91	2,310.12	3,656.03
Net Income.....	8,860.72	62,184.00	71,044.72
\$8,860.72			
= 0.6% on Capital.			
\$1,465.600			

Operating Expenses, Intra-state.....	335,576.42	98,619.17	434,195.59
Taxes, ".....	12,413.87	5,746.16	18,160.03
	<u>347,990.29</u>	<u>104,365.33</u>	<u>452,355.62</u>

Passenger: $\frac{\$347,990.29}{\$355,505.10} = 97.88\%$

Freight: $\frac{\$104,365.33}{\$164,239.21} = 63.54\%$

Passenger and Freight: $\frac{\$452,355.62}{\$519,744.51} = 87.03\%$

Add for Interest, Dividends, etc..... 23.013%
110.043%

(6 copies)
 1/31/13

254 "COMPLAINANT'S EXHIBIT L-1."

Norfolk & Western Railway Co.

West Virginia Two-cent Passenger Rate Case.

Rebuttal of Hillman Exhibit # 7.

Hillman Exhibit # 7 purports to show cost earning \$53,653.12 of gross revenue on intrastate passenger and freight traffic in West Virginia in May, 1910.

Mr. Hillman, in Exhibit # 7, shows intrastate passenger and freight revenue in West Virginia for May, 1910:

Passenger revenue, Pocahontas Division....	\$17,672.18
Other revenue, ".....	4,654.85
Passenger revenue, Kenova Division.....	9,203.59
Other revenue, ".....	2,514.90
Intrastate freight, State of West Va.....	19,365.00
Other operating revenue, Pocahontas and Kenova Divisions	242.60

Total intrastate earnings..... \$53,653.12

Passenger operating expenses for May, 1910,
as per Hillman Exhibit # 3..... \$32,116.66

Freight operating expenses is 20% of revenue
as per exhibit # 5, in which he explains
in his testimony on page 60 of the record,
that the cost of moving intrastate freight
is 5.8572 mills per ton per mile, and as
intra-state revenue per ton per mile on the
Pocahontas Division is 2.9342 cents, the
cost of earning 2.9342 cents being 5.8572
mills, or 20% ;

Therefore, 20% of intrastate freight revenue,
\$19,365.00 \times 20% = expenses of intra-
state freight traffic..... 3,873.00

Taxes 2,616.66

Total expenses \$38,606.12

Percentage of cost, 71.9553%.

255

The cost of earning the intrastate freight
traffic for May, 1910, as shown by Mr.
Hillman \$3,873.00

Is strongly objected to, as explained in criti-
cism of Hillman Exhibit # 5?

In the statement of passenger revenue as
shown in this exhibit appears,—

"Other Pass'r Revenue" Poca. Div. intra-
state, May..... \$4,654.85

"Other pass'r revenue," Kenova Div. intra-
state, May..... 2,514.90

Which Mr. Hillman obtains by applying to
the total "other passenger revenue" the
percentages based upon expenses as criti-
cised in Exhibit # 6.

Pocahontas District, other items of passenger
train revenue, \$8,794.79 \times 52.9294%... \$4,654.85

It is claimed this amount of \$8,794.79
should be divided between intra- and inter-
state on basis of passenger revenue from
intra- and interstate; thus on the Pocahontas
District for May, 1910:

Intrastate passenger revenue (passengers
only)..... \$17,672.18—46.90%

Total passenger revenue, (passengers only). 37,677.46

Therefore the "other items of passenger train revenue,"

\$8,794.79 \times 46.904% = other items of passenger
train revenue intrastate..... \$4,125.12

Similarly on the Kenova District, May, 1910:
 Intrastate passenger revenue (passengers only) \$9,203.59—54.003%
 Total passenger revenue, (passengers only). 17,042.64

Therefore the total "other items of passenger train revenue," May, 1910, Kenova District, (as shown in criticism of Hillman Exhibit # 6), $\$4,274.54 \times 54.0003\% =$ intrastate other items of passenger revenue \$2,308.38

256 With these corrections made, Hillman Exhibit # 7 would read, May, 1910:

Intrastate passenger revenue, Poca. Dis't. . . .	\$17,672.18
Other passenger revenue, " "	4,125.10
Intrastate passenger revenue, Kenova Dis't. . .	9,203.59
Other passenger revenue, " " " "	2,308.38
Intrastate freight revenue, West Virginia, May, 1910	19,365.00
Other operating revenue, Pocahontas and Kenova Districts	242.60

Total intrastate earnings, May, 1910. \$52,916.85

Passenger operating expenses for May, 1910, Pocahontas District, as per Hillman Exhibit # 3.	32,116.66
Freight operating expenses as worked out by Mr. Hillman in Exhibits # 5 and # 7.	3,873.00
Taxes	2,616.66
	<u>\$38,606.32</u>

Percentage of cost, 72.957%.

On page 61 of record Mr. Hillman refers to examination of Fourteenth annual report of the Norfolk & Western Railway, for June, 1910, and shows that interest, rents, hire of equipment, rents of tracks, yards and terminals, and dividends at 5% on common stock and 4% on preferred, and excluding taxes considered above, would consume of the gross operating revenue. 23.013%

95.970%

And on page 135 of record, states that if 6% had been allowed on common stock there would be added. 1.877%

97.847%

Taking a period of five years, 1906-1910 inclusive, the proportion of gross operating revenue necessary to allow 6% on common stock and pay the interest charges, rents, etc., specified above, would be. 28.800%
 Which, added to the revised percentage above. 72.957%

Makes a total of. 101.757%

With no provisions for expenditures for Additions and Betterments.

Sheet # 3.

On sheet # 1 of this criticism of Hillman Exhibit # 7, is shown the original percentage of operating revenue consumed by operating expenses on passenger and freight traffic in West Virginia:

Total intrastate expenses and taxes as originally figured by Mr. Hillman.....	\$38,606.32	
Total intrastate earnings.....	53,653.12	= 71.9553%

On sheet # 2 is shown what this percentage would be if the method is adopted of distributing the item of "Other passenger train earnings" on basis of revenue from intra- and interstate passengers, and using Mr. Hillman's cost of handling intrastate freight traffic under intrastate conditions as figured in his Exhibit # 5:

Total intrastate expenses and taxes.....	\$38,606.32	
Total intrastate earnings.....	52,916.85	= 72.957%

Under the revision of Hillman Exhibit # 5 as revised by J. W. C. the expanded freight expenses show a cost per ton per mile on intrastate freight of 9.4172 mills.

And applying this to the West Virginia intrastate tons one mile for May, 1910: 650968×9.4172 mills, we have as the cost.....	\$6,215.05
Instead of the amount as shown by Mr. Hillman of.....	\$3,873.00
Adding the intrastate passenger expenses as per Hill- man Exhibit # 3.....	32,116.66
Taxes	2,616.66

Total operating expenses and taxes on intrastate traffic, passenger and freight.....	\$40,948.37
258 Gross earnings intrastate, passenger and freight..	\$52,916.85
	\$40,948.37

Therefore, $\frac{\$40,948.37}{52,916.85}$ = percentage of operating ex- penses and taxes.....	77.382%
---	---------

On page 61 of record of March, 1912, depositions, Mr. Hillman refers to the percentage of gross revenues for year ending 6/30/1910 consumed by interest, rents, hire of equipment, rents of tracks, yards and terminals, and dividends at 4% on preferred and 5% on common (and excluding taxes previously considered).....	23.013%
	100.395%

And on page 136 of record, states that if 6% dividend had been allowed on common stock, there should be added	1.877%
	102.272%

Which means that the intrastate passenger and freight traffic, to earn its operating expenses, taxes and its share of the interest on bonds and stock, would cost \$1.02272 to earn \$1.00, and with no provision for that class of Additions and Betterments which should be provided from income rather than be capitalized.

259

DEFENDANTS' J. W. C. EXHIBIT No. 1.

In the Circuit Court of Kanawha County, State of West Virginia.
In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, Plaintiff,

vs.

W. G. CONLEY, Attorney General of the State of West Virginia, et al.,
Defendants.

Question 25, Page 61, Transcript of Evidence.

Question by Attorney General CONLEY:

"Will you make up and file a statement as part of your deposition showing the number of Freight Engines used, the number of Miles made in aggregate and the cost of operating same in West Virginia for each year ending June 30th, 1907, 1908, 1909 and 1910, and also a separate statement showing the same as to Passenger Engines?"

Answer:

It is not practicable to give the precise number of Engines used in West Virginia, as separate engines are used on each Operating Division, which in turn operate in more than one State. A statement is shown below which shows:

(1) Proportion of Total Cost of Operating Engines on all such Divisions as are partly located in West Virginia, for the years ending June 30th, 1907-8-9-10, for Freight Engines,

" Passenger "

(2) Freight Engine Mileage in West Virginia for 1907-8-9-10.

(3) Passenger " " " " " " " "

(4) Average cost of Freight Engine per Mile run in West Virginia.

(5) " " " Passenger " " " " " " "

(6) Freight Earnings per Mile run of Freight Engines.

(7) Passenger " " " " " Passenger "

J. W. C. EXHIBIT #1, PAGE 2.

Statement of Cost of Operating Engines in West Virginia for Fiscal Years.

	1906-7.	1907-8.	1908-9.	1909-10.
Freight.				
Engine Repairs.....	\$366,506.67	\$292,149.23	\$253,271.90	\$401,888.34
Road Enginemen.....	503,839.81	494,020.69	385,174.19	575,414.24
Eng. House Exp. Road.....	75,173.49	83,606.58	81,651.39	104,535.01
Road Loco. Fuel.....	326,874.63	355,753.33	366,284.54	552,119.53
“ “ Water.....	32,552.70	29,862.78	28,245.66	34,133.90
“ “ Lubricants.....	19,806.39	8,695.68	8,372.42	11,625.80
“ “ Other Supplies.....	25,693.47	15,049.67	10,678.69	15,788.15
Total.....	1,350,447.16	1,279,137.96	1,133,678.79	1,695,504.97
Passenger.				
Engine Repairs.....	\$64,191.47	\$53,102.17	\$51,671.93	\$72,422.69
Road Enginemen.....	59,174.38	64,641.39	60,407.35	62,153.30
Eng. House Exp. Road.....	18,790.22	20,797.55	20,181.75	26,062.53
Road Loco. Fuel.....	30,413.16	35,499.16	34,993.02	37,649.96
“ “ Water.....	7,944.71	7,292.09	7,249.50	8,555.97
“ “ Lubricants.....	3,020.62	1,599.50	1,708.59	2,268.29
“ “ Other Supplies.....	3,061.13	2,435.20	1,891.58	2,189.27
Total.....	186,595.69	185,367.06	178,103.72	211,302.01
Freight Engine Mileage.....	3,482,796	3,224,272	3,311,499	4,472,028
Ave. Cost of Frt. Eng. per Mile run.....	\$.388	\$.3967	\$.3424	\$.3791
Passenger Engine Mileage.....	722,253	815,251	791,508	822,691
Ave. Cost of Pass. Eng. Per Mile run.....	\$.258	\$.2273	\$.2250	\$.2567
Ave. Earnings per Engine Mile run:				
Frt. Earnings per Frt. Eng. Mile run.....	\$2.04	\$2.03	\$2.16	\$2.03
Pass. Earnings per Pass. Eng. Mile run.....	\$1.38	\$1.07	\$.994	\$1.10

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J. W. C. EXHIBIT #2.

In the Circuit Court of Kanawha County, State of West Virginia.
In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, Plaintiff,

vs.

W. G. CONLEY, Attorney General of the State of West Virginia, et
al., Defendants.

Question by Attorney General CONLEY:

"In the direct examination you gave (see page 40 of transcript of evidence) as I now recall, the gross revenues per Mile or Road for Intra-state West Virginia Passenger business for the years 1907, 1908 and 1909: Will you give the Gross Passenger Revenues per Mile for these years including the year 1910, including with the Intra-state Passenger business all other sources of Passenger Revenue, as well as the Inter-state Passenger Revenue to which West Virginia is entitled?"

Answer:

1. The inquiry made on direct examination (see page 40 of evidence) referred to Passenger Revenue per Mile of Road in West Virginia and Passenger Revenue per Mile of Road outside of West Virginia, both Intra- and Inter-state:

2. Passenger Revenue as defined in Classification of Operating Revenues prescribed by the Interstate Commerce Commission, excludes Excess Baggage, U. S. Mail, Express, Parcel Room Receipts, Storage of Baggage, Station and Train Privileges:

3. The inquiry as propounded on direct examination was confined to the Passenger Revenue as defined in paragraph 2 of this exhibit, and was as follows:—

	1907.	1908.	1909.
N. & W. Ry. System outside of West Virginia	\$2,340	\$2,228	\$2,028
West Virginia	1,889	1,554	1,376
Excess Passenger Revenue per Mile of Road outside of West Virginia over the Passenger Revenue in West Virginia	451	674	652

Adding to the Passenger Revenue in West Virginia, the revenue from Excess Baggage, U. S. Mail, Parcel Room receipts, Station and Train Privileges, Sundry items of Miscellaneous Passenger Revenue; then the results would be summarized as follows:—

Passenger Earnings Per Mile of Road in West Virginia, Both Intra-State and Inter-State.

	1907.	1908.	1909.	1910.
Gross Passenger Revenue.....	\$816,932.73	\$691,187.43	\$623,804.31	\$726,279.19
Add for Excess Baggage, U. S. Mail Express, Station and Train Privileges.....	176,381.44	178,972.89	162,921.69	179,205.37
Total	\$993,314.17	\$870,160.32	\$786,726.00	\$905,484.56
Miles of Road in West Virginia.....	432.65	444.69	453.25	453.32
Passenger Earnings per Mile of Road....	\$2,296	\$1,957	\$1,736	\$1,997
As compared with Passenger Earnings per Mile of Road outside of West Virginia..	2,754	2,663	2,459	2,604
Excess of Passenger Earnings per Mile of Road outside of West Virginia.....	\$458	\$706	\$723	\$607

Exhibit J. W. C. No. 3

7

GENERAL INCOME ACCOUNT

For the Year Ending June 30th, 1907, and Comparison with Previous Year

EARNINGS.	1907.	1907.	1906.	INCREASE OR DECREASE.
From passengers	\$4,163,119 22		\$3,598,557 60	I. \$564,561 62
" freight	26,000,945 81		24,111,800 91	I. 1,889,144 90
" mail	287,981 71		264,576 25	I. 3,405 46
" express	468,576 41		364,579 10	I. 103,997 31
" miscellaneous	263,758 01		148,251 77	I. 115,506 24
TOTAL EARNINGS		\$31,164,381 16	\$28,487,765 63	I. \$2,676,615 53
EXPENSES.				
Maintenance of way and structures	\$3,895,548 39		\$3,439,797 14	I. \$455,751 25
Maintenance of equipment	5,239,898 88		4,749,832 42	I. 490,066 46
Conducting transportation	9,793,901 68		8,355,373 19	I. 1,438,528 49
General expenses	585,186 69		519,621 07	I. 65,565 62
OPERATING EXPENSES		\$19,514,535 64	\$17,064,623 82	I. \$2,449,911 82
NET EARNINGS FROM OPERATIONS		\$11,649,845 52	\$11,423,141 81	I. \$226,703 71
To which add:—				
Interest, General Account	\$35,867 07		113,090 59	D. 77,223 52
Rents	53,080 48		52,254 08	I. 826 40
		88,947 55	\$165,344 67	D. \$76,397 12
TOTAL INCOME		\$11,738,793 07	\$11,588,486 48	I. \$150,306 59
From which deduct:—				
Interest on funded debt	\$3,222,807 33		3,069,146 66	I. 153,660 67
Interest on Equipment Trust obligations	492,888 89		316,641 67	I. 176,247 22
Taxes	996,000 00		735,000 00	I. 261,000 00
Rents of tracks, yards, terminals and other property	26,777 83		15,323 39	I. 11,454 44
		\$4,738,474 05	\$4,136,111 72	I. \$602,362 33
NET INCOME		\$7,000,319 02	\$7,452,374 76	D. \$452,055 74
From this net income for the year ending June 30th, 1907				\$7,000,319 02
The following amounts have been deducted:—				
Payment to Pocahontas Coal and Coke Company on account of deficiency of interest on Norfolk and Western-Pocahontas Joint Bonds			\$218,000 00	
Rest houses for trainmen, and minor charges to income			47,211 33	
Dividends on adjustment preferred shares:				
No. 19. 2 per cent., August 17th, 1906	\$459,822 00			
No. 20. 2 per cent., February 15th, 1907	459,822 00			
			919,644 00	
Appropriations for Betterments to Property			250,000 00	
Appropriations for Acquiring Additional Equipment			996,652 06	
				2,431,507 39
Amount carried to Profit and Loss for the year				\$4,568,811 63
Amount to credit of Profit and Loss, June 30th, 1906			3,800,853 94	
Dividends on common shares:				
No. 12. 2½ per cent., December 21st, 1906	\$1,611,730 00			
No. 13. 2½ per cent., June 19th, 1907	1,611,730 00			
			3,223,460 00	
				577,393 94
Discount and commission on securities sold				\$5,146,205 57
				673,800 00
Balance to credit of Profit and Loss, June 30th, 1907				\$4,472,405 57

11—600

263 The gross earnings were \$16,612, and the net earnings \$6,210 per mile of road operated.

The operating expenses were 52.62 per cent. of the gross earnings as against 59.90 per cent. in the preceding year.

Taxes were 3.20 per cent. of the gross earnings.

Capital Stock.

At the annual and special meeting of the stockholders, held October 11th, 1906, the stockholders increased the common stock of the Company by the sum of \$34,000,000, to an aggregate of \$100,000,000. None of this additional stock has been issued, but it is reserved to enable the holders of outstanding convertible bonds to convert such bonds into the common stock of the Company. The capital stock outstanding consists of—

660,000 shares of common stock.....	\$66,000,000 00
230,000 shares of adjustment preferred stock.....	23,000,000 00
Total.....	<u>\$89,000,000 00</u>

of which there was in the treasury of the Company at the close of the fiscal year, 89 shares of adjustment preferred stock and 15,308 shares of common stock.

CONSTRUCTION, EQUIPMENT AND BETTERMENTS.

The expenditures for Construction and Betterments during the year are summarized in the following table, the aggregate expenditure being \$6,110,343.64, of which \$3,916,221.31 was charged to Property Account, and the remainder, \$2,194,122.33, to Betterment Fund.

	Charged against Property Acct.	Charged against Betterment Fund.	Total.
Station buildings and shops . . .	\$540,869 64	\$145,256 60	\$686,126 24
Coal, water, and sand supply plants	34,070 57	43,805 45	77,876 02
Dry Fork Branch	65,238 54	. . . . .	65,238 54
Other branches and extensions . .	11,448 67	22,011 99	33,460 66
Second track (including tunnel- ing)	1,760,106 20	1,380,047 54	3,140,153 74
Fencing . . . . .	. . . . .	20,820 16	20,820 16
Ballasting . . . . .	. . . . .	4,114 77	4,114 77
Lining tunnels . . . . .	. . . . .	35,115 38	35,115 38
Sidings, passing sidings, and yards	1,336,019 17	23,763 65	1,359,787 82
Replacing bridges and trestles . .	. . . . .	460,008 34	460,008 34
Improving alignment and grade, . .	. . . . .	16,470 46	16,470 46
Interlocking and signal appa- ratus, etc.	162,118 93	42,702 99	204,821 92
Miscellaneous	6,349 59	. . . . .	6,349 59
Total	\$3,916,221 31	\$2,194,122 33	\$6,110,343 64
Cost of construction Concord and Forest Branches . . . . .	. . . . .	. . . . .	1,381,142 76

Advances for construction purposes were made as follows:—

Pocahontas and Western Railroad	\$210,613 22
Guyandot and Tug River Railroad	145,161 97
West Virginia Southwestern Railway	2,896 99
Big Stony Railway	43,793 92
Interior and West Virginia Railroad	34,100 74
% Virginia and Potts	
Creek Railroad	20,899 36
Blackstone and Lunenburg Railroad	35,203 32
	<hr/>
	\$492,669 52

In pursuance of your Company's policy of making yearly appropriations from Surplus Income to meet the cost of extraordinary replacements, renewals and betterments to your property, the sum of \$250,000 has been so appropriated and credited to the

265 Betterment Fund. Following is a statement of the Betterment Fund for the fiscal year.

The Betterment Fund created out of Surplus Income	
had to its credit June 30th, 1906.....	\$3,148,771 00
There was credited to this Fund out of the Surplus	
Income of the year ending June 30th, 1907....	250,000 00
	<hr/>
	\$3,398,771 00
Charged against Betterment Fund during the year..	2,194,122 33
	<hr/>
Balance to credit of Fund, June 30th, 1907.....	\$1,204,648 67
	<hr/>

The Fund for Acquiring Additional Equipment was closed as of June 30th, 1907, and is replaced from that date with the Equipment Replacement Accounts prescribed by the Interstate Commerce Commission. Through this Fund the Company charged off during the year \$241,906.27 on account of the cost of new equipment, and \$1,500,000 of matured Equipment Trust principal.

265a

Traffic.

As compared with the preceding year, passengers carried increased 445,237, or 11.7 per cent.; the average haul of passengers increased 0.73 miles.

The total passenger revenue increased \$564,561.62, or 15.7 per cent.; the average rate passenger per mile increased 0.040 cents.

Tons of freight carried increased 916,684 tons, or 4.8 per cent.; the average haul of freight increased 0.13 miles.

The total freight revenue increased \$1,889,144.90, or 7.8 per cent.; the average rate per ton per mile increased 0.014 cents.

The freight train mileage increased 582,071 miles, or 6.7 per cent.; the average tons per train mile decreased 10 tons, or 1.7 per cent.

The total shipments were 9,400,432 tons, a decrease of 110,007 tons, or 1.2 per cent.

The lumber shipments were 1,968,739 tons, an increase of 260,238 tons, or 15.2 per cent.

The shipments of other low-class commodities connected with the iron and steel industries were as follows:—

Coke shipments were 2,413,803 tons, an increase of 48,942 tons, or 2.1 per cent.

Ore shipments were 968,039 tons, an increase of 93,032 tons, or 10.6 per cent.

Pig and bloom iron shipments were 581,227 tons, a decrease of 2,726 tons, or 0.5 per cent.

Exhibit J. N. C. No 4.

7

GENERAL INCOME ACCOUNT

For the Year Ending June 30th, 1908, and Comparison with Previous Year.

	1908.	1908.	1907.	Increase or Decrease.
EARNINGS.				
From passengers	\$3,977,482 05		\$4,163,119 22	D. \$185,637 17
" freight	23,990,629 53		26,000,945 81	D. 2,010,316 28
" mail	290,577 85		267,981 71	I. 22,596 14
" express	449,324 38		466,576 41	D. 19,252 05
" miscellaneous	254,203 38		263,758 01	D. 9,554 65
TOTAL EARNINGS		\$28,962,217 15	\$31,164,381 16	D. \$2,202,164 01
EXPENSES.				
Maintenance of way and structures	\$3,458,087 99		\$3,895,548 39	D. \$437,460 40
Maintenance of equipment	4,683,080 27		5,239,898 88	D. 556,818 61
Traffic expenses	475,605 89		537,673 67	D. 62,067 78
Conducting transportation	9,346,048 67		9,256,228 01	I. 89,820 66
General expenses	596,664 50		585,186 69	I. 11,477 81
OPERATING EXPENSES		\$18,559,487 32	\$19,514,535 64	D. \$955,048 32
NET EARNINGS FROM OPERATIONS.				
To which add:—		\$10,402,729 83	\$11,646,845 52	D. \$1,244,115 69
Interest, General Account	\$75,424 80		35,867 07	I. 39,557 73
Rents	51,207 12		53,089 48	D. 1,873 36
Hire of equipment	504,340 18			I. 504,340 18
Income from other sources	76,057 27			I. 76,057 27
		707,029 37	\$88,947 55	I. \$618,081 82
TOTAL INCOME		\$11,109,759 20	\$11,738,793 07	D. \$629,033 87
From which deduct:—				
Interest on funded debt	\$3,785,013 34		3,222,807 33	I. 562,206 01
Interest on Equipment Trust obligations	442,666 66		492,888 89	D. 50,222 23
Taxes	1,020,800 00		996,000 00	I. 24,800 00
Rents of tracks, yards, ter- minals and other property	87,370 51		26,777 83	I. 60,592 68
		5,335,850 51	\$4,738,474 05	I. \$597,376 46
NET INCOME		\$5,773,908 69	\$7,000,319 02	D. \$1,226,410 33

From this net income for the year ending June 30th, 1908 \$5,773,908 69

The following amounts have been deducted:—

Payment to Pocahontas Coal and Coke Company on account of deficiency of interest on Norfolk and Western Pocahontas Joint Bonds	\$192,000 00	
Other charges to income	53,792 40	
Dividends on adjustment preferred shares:		
No. 21. 2 per cent., August 16th, 1907	\$459,622 00	
No. 22. 2 per cent., February 19th, 1908	459,834 00	\$919,656 00
Appropriation for Betterments to Property	1,380,000 00	2,525,448 40
Amount carried to Profit and Loss for the year		\$3,248,460 29
Amount to credit of Profit and Loss, June 30th, 1907	\$4,472,405 57	
Dividends on common shares:		
No. 14. 2½ per cent., December 18th, 1907, \$1,611,730 00		
No. 15. 2 per cent., June 18th, 1908	1,289,384 00	2,901,114 00
		1,571,291 57
Discount and commission on securities sold		346,980 00
Balance to credit of Profit and Loss, June 30th, 1908		\$4,472,771 86

267 The gross earnings were \$15,397, and the net earnings \$5,530 per mile of road operated.

The operating expenses were 64.08 per cent. of the gross earnings, as against 62.62 per cent. in the preceding year.

Taxes were 3.52 per cent. of the gross earnings.

Capital Stock.

The authorized capital stock of the Company is \$100,000,000 common stock and \$23,000,000 adjustment preferred stock. The outstanding capital stock consists of—

660,000 shares of common stock	\$66,000,000 00
230,000 shares of adjustment preferred stock	23,000,000 00
Total	\$89,000,000 00

Six shares of the adjustment preferred stock in the treasury of the Company were exchanged for securities of the old Company which had not been deposited under the plan of reorganization, and at the close of the year there remained in the treasury 83 shares of adjustment preferred stock and 15,308 shares of common stock.

CONSTRUCTION, EQUIPMENT AND BETTERMENTS.

The expenditures for construction, equipment and betterments, summarized in the following table, aggregated \$8,418,993.46, of which \$6,137,599.24 was charged to Property Accounts, and \$2,281,394.22, to Betterment Fund.

	Charged to Property Accts.	Charged to Betterment Fund.	Total.
Branches and extensions . . .	\$322,134 64		\$322,134 64
Right of way and station grounds	244,937 50	\$45,370 60	290,308 10
Widening cuts and fills . . .		68,158 65	68,158 65
Protection of banks		85,318 51	85,318 51
Grade revision and change of line		23,315 07	23,315 07
Tunnel improvements		2,626 41	2,626 41
Bridges, trestles and culverts .		294,753 07	294,753 07
Ballast		722 02	722 02
Additional main tracks	1,163,322 09	924,953 50	2,088,275 59
Sidings and spur tracks	162,250 80	143 15	162,393 95
Terminal yards	720,511 40	12,894 48	733,405 88
Fencing right of way		11,090 50	11,090 50
Track elevation, elimination of grade crossings, etc.	4,500 65	10,191 97	14,692 62
Interlocking and other signal apparatus		79,520 24	79,520 24
Telegraph and telephone lines .		19,478 12	19,478 12
Station buildings and fixtures .	95,733 90	35,465 36	131,199 26
Shops, enginehouses and turn- tables	56,469 39	20,662 05	77,131 44
Shop machinery and tools . . .		141,828 77	141,828 77
Water and fuel stations	19,704 93	21,520 57	41,225 50
Miscellaneous structures		12,177 72	12,177 72
Reconstruction of road pur- chased	860 31		860 31
Rolling stock	3,347,173 63		3,347,173 63
	\$6,137,599 24	\$1,810,190 76	\$7,947,790 00
Add Principal of Equipment Trusts		471,203 46	471,203 40
Total	\$6,137,599 24	\$2,281,394 22	\$8,418,993 46

Advances for construction purposes were made as follows:—

Blackstone and Lunenburg Railroad	\$2,613 61
Lynchburg Belt Line & Connecting Railway	1,138,041 83
Big Stony Railway	145,789 56
Interior and West Virginia Railroad	239,383 09
“ “ “ “ “ % Virginia and Potts	
Creek Railroad	20,347 00
Pocahontas and Western Railroad	98,232 78
Guyandot and Tug River Railroad	10,185 05
Barker and Clarks Gap Railroad	69 40
Clear Fork and Oceana Railroad	22 12
Caretta Railway	10,386 59

269 To meet the cost of extraordinary replacements and betterments to your property the sum of \$1,360,000 has been appropriated from Surplus Income and credited to the Betterment Fund.

Following is a statement of the Betterment Fund for the fiscal year:—

Credit balance in Betterment Fund, June 30th, 1907.	\$1,204,648	67
Amount credited from Surplus Income of the year ending June 30th, 1908.....	1,360,000	00
	<hr/>	
	\$2,564,648	67
Charged against Betterment Fund during the year..	2,281,394	22
	<hr/>	
Balance to credit of Fund June 30th, 1908...	\$283,254	45
	<hr/>	

Following is a statement of the Equipment Replacement Accounts set up as of July 1st, 1907, pursuant to order of the Interstate Commerce Commission:—

Credits to Equipment Replacement Accounts:

Credit Balance from Equipment Renewal Account (closed June 30th, 1907).....	\$291,318	70
Equipment Depreciation for the year, charged in Operating Expenses.....	788,751	16
Credit for Equipment destroyed or sold, net value	154,355	04
Salvage from Equipment destroyed.....	70,483	04
	<hr/>	
	\$1,304,907	94

Equipment Expenditures charged to Equipment Replacement Accounts:

Principal of Equipment Trusts.	\$1,128,796	54
Other Equipment Payments...	176,111	40
	<hr/>	
	\$1,304,907	94
	<hr/>	

TRAFFIC.

As compared with the preceding year, passengers carried increased 573,745, or 13.5 per cent.; the average haul of passengers increased 1.96 miles.

The total passenger revenue decreased \$185,637.17, or 4.5 per cent.; the average rate per passenger per mile decreased 0.463 cents.

Tons of freight carried decreased 1,575,028 tons, or 7.8 per cent.; the average haul of freight increased 7.70 miles.

The total freight revenue decreased \$2,010,316.28, or 7.7 per cent.; the average rate per ton per mile decreased 0.014 cents.

The freight train mileage decreased 673,249 miles, or 7.2 per cent.; the average tons per train mile increased 2 tons, or 0.4 per cent.

The coal shipments were 9,719,968 tons, an increase of 319,536 tons, or 3.4 per cent.

The lumber shipments were 1,540,492 tons, a decrease of 428,247 tons, or 21.8 per cent.

The shipments of other low-class commodities connected with the iron and steel industries were as follows:—

Coke shipments were 2,147,010 tons, a decrease of 266,793 tons, or 11.1 per cent.

Ore shipments were 688,560 tons, a decrease of 279,479 tons, or 28.9 per cent.

Pig and bloom iron shipments were 315,825 tons, a decrease of 265,402 tons, or 45.7 per cent.

The following statement gives the passenger and freight statistics for the years 1908 and 1907:—

TRAFFIC AND MILEAGE STATISTICS.				1907-1908.	1906-1907.	Increase or Decrease.	Per Cent.
PASSENGER TRAFFIC:—							
Passengers carried.....		4,824,650		4,250,905	I.	573,745	13.5
" " one mile.....		209,279,408		176,082,609	I.	33,196,799	18.9
" " per mile of road.....		111,260		93,861	I.	17,399	18.5
Average distance carried per passenger (miles).....		43.38		41.42	I.	1.96	4.7
Total passenger revenue.....		\$3,977,482 05		\$4,163,119 22	D.	\$185,637 17	4.5
Average revenue from passengers (cents).....		82.44		97.93	D.	15.49	15.8
Average revenue per passenger per mile (cents).....		1.901		2.364	D.	0.463	19.6
Total passenger earnings.....		\$4,798,277 59		\$4,969,578 92	D.	\$171,301 33	3.4
Passenger earnings per mile of road.....		\$2,550 92		\$2,649 03	D.	\$98 11	3.7
" " train mile (cents).....		120.72		138.74	D.	18.03	13.0
FREIGHT TRAFFIC:—							
Tons of freight carried.....		18,608,190		20,183,218	D.	1,575,028	7.8
Tons carried one mile.....		4,985,915,528		5,252,561,457	D.	266,645,929	5.1
" " per mile of road.....		2,650,673		2,799,873	D.	149,200	5.3
Average distance carried per ton (miles).....		267.94		260.24	I.	7.70	3.0
Total revenue from freight.....		\$23,990,629 53		\$26,000,945 81	D.	\$2,010,316 28	7.7
Average revenue per ton of freight (cents).....		128.93		128.82	I.	0.11	0.1
" " per mile (cents).....		0.461		0.495	D.	0.034	2.8
Total freight earnings.....		\$24,163,939 56		\$26,194,802 24	D.	\$2,030,862 68	7.8
Freight earnings per mile of road.....		\$12,846 33		\$13,963 11	D.	\$1,116 78	8.0
" " train mile (cents).....		276.81		283.78	D.	6.97	2.5

TRAFFIC AND MILEAGE STATISTICS.

	1907-1908.	1906-1907.	Increase or Decrease.	Per Cent.
TOTAL TRAFFIC:-				
Gross earnings...	\$28,862,217 15	\$31,164,981 16	D. \$2,202,164 01	7.1
" " per mile of road.....	\$15,397 24	\$16,612 14	D. \$1,214 90	7.3
" " " train mile (cents).....	231.10	243.28	D. 12.18	5.0
Operating expenses:				
Passenger.....	\$3,074,246 10	\$3,079,886 33	D. \$5,590 23	0.2
Freight.....	\$15,485,241 22	\$16,434,699 31	D. \$949,458 09	5.8
Passenger and freight.....	\$18,559,487 32	\$19,514,535 64	D. \$955,048 32	4.9
Per mile of road, passenger.....	\$1,634 37	\$1,641 70	D. \$7 33	0.4
" " " freight.....	\$8,232 45	\$8,760 50	D. \$528 05	6.0
" " " passenger and freight.....	\$9,866 82	\$10,402 20	D. \$535 38	5.1
" " " train mile, passenger (cents).....	77.34	85.98	D. 8.64	10.0
" " " " freight (cents).....	177.39	178.04	D. 0.65	0.4
" " " " passenger and freight (cents).....	148.09	152.31	D. 4.22	2.8
" " " passenger per mile (cents).....	1.469	1.749	D. 0.280	16.0
" " " ton per mile (cents).....	0.311	0.313	D. 0.002	0.6
Net earnings:				
Passenger.....	\$1,724,031 49	\$1,889,742 59	D. \$165,711 10	8.8
Freight.....	\$8,678,698 34	\$9,760,102 93	D. \$1,081,404 59	11.1
Passenger and freight.....	\$10,402,729 83	\$11,649,845 52	D. \$1,247,115 69	10.7
Per mile of road, passenger.....	\$916 55	\$1,007 33	D. \$90 78	9.0
" " " freight.....	\$4,613 87	\$5,202 61	D. \$588 74	11.3
" " " passenger and freight.....	\$5,530 42	\$6,209 94	D. \$679 52	10.9
" " " train mile, passenger (cents).....	43.38	52.76	D. 9.39	17.8
" " " " freight (cents).....	99.42	105.74	D. 6.32	6.0
" " " " passenger and freight (cents).....	83.01	90.92	D. 7.91	8.7
" " " passenger per mile (cents).....	0.824	1.073	D. 0.249	23.2
" " " ton per mile (cents).....	0.174	0.185	D. 0.011	5.9

TRAFFIC AND MILEAGE STATISTICS.	1907-1908.	1906-1907.	Increase or Decrease.	Per Cent.
TRAIN MILEAGE:—				
Of revenue passenger trains.....	3,802,761	3,581,926	I. 220,835	6.2
" revenue freight trains.....	8,557,450	9,230,699	D. 673,249	7.2
" revenue mixed trains.....	172,103	*		
" revenue special trains.....	4,970	*		
" non-revenue trains.....	506,757	715,717	D. 208,960	29.2
Made by all trains.....	13,044,041	13,528,342	D. 484,301	3.6
ENGINE MILEAGE:—				
Of passenger engines.....	3,802,761	3,581,926	I. 220,835	6.2
" passenger engines employed in helping passenger trains.....	209,222	214,193	D. 4,971	2.3
" freight engines.....	8,557,450	9,230,699	D. 673,249	7.3
" freight engines employed in helping freight trains.....	4,176,123	5,659,916	D. 1,483,793	26.5
" mixed engines.....	172,103	*		
" mixed train engines employed in helping mixed trains.....	7,945	*		
" special train engines.....	4,970	*		
" special train engines employed in helping special trains.....	1,215	*		
" shifting engines.....	2,994,575	3,136,436	D. 141,861	4.5
" non-revenue engines.....	567,977	720,902	D. 152,925	21.2
" all engines.....	20,494,341	22,544,072	D. 2,049,631	9.0
CAR MILEAGE:—				
Mileage of passenger cars.....	21,842,100	19,879,208	I. 1,962,892	9.9
Average number passenger cars per train mile.....	5.50	5.55	D. .05	.009
Average number of passengers per train mile.....	53	49	I. 4	8.2
Mileage of cars in special service.....	58,839	*		
Mileage of loaded freight cars:				
North and East.....	99,336,054	113,790,046	D. 14,453,992	12.7
South and West.....	83,712,120	92,123,010	D. 8,410,890	9.1
Mileage of empty freight cars:				
North and East.....	51,614,887	47,825,780	I. 3,789,107	7.9
South and West.....	63,033,431	65,076,042	D. 2,042,611	3.1
Mileage of caboose cars:				
North and East.....	4,291,175	†		
South and West.....	4,247,355	†		
Average number freight cars per train mile excluding caboose.....	34.10	34.54	D. .44	.012
Average number loaded freight cars per train mile.....	20.97	22.31	D. 1.34	6.0
Average number empty freight cars per train mile excluding caboose.....	13.13	12.23	I. .90	7.4
Average number tons freight per train mile.....	571	569	I. 2	0.4
Average number tons freight per loaded car mile.....	27.24	25.50	I. 1.74	6.8
Average mileage operated during year.....	1,881	1,876	I. 5	0.3

* Included in freight and passenger.

† Included in empty freight car mileage.

Summary of Passenger and Freight Car Mileage.

	Year ending June 30th.	
	1908.	1907.
Total passenger car mileage on Norfolk and Western Railway	21,842,100	19,879,208
Mileage of Norfolk and Western passenger cars on Norfolk and Western Railway	16,720,104	15,759,070
Mileage of Norfolk and Western passenger cars on foreign lines	1,208,035	1,291,454
Total mileage made by Norfolk and Western passenger cars	17,928,139	17,050,524
Mileage of foreign passenger cars (including Pullman) on Norfolk and Western Railway	5,121,996	4,120,138
Percentage of passenger car mileage made by foreign cars	23.45	20.73
Mileage of Norfolk and Western freight cars on Norfolk and Western Railway (including cabooses).	204,641,146	195,848,745
Mileage of foreign freight cars on Norfolk and Western Railway	101,595,157	122,966,133
Percentage of freight car mileage made by foreign cars	33.18	38.57
Mileage of Norfolk and Western box cars on Norfolk and Western Railway	31,056,121	25,267,081
Average number of box cars in service on Norfolk and Western Railway	3,747	3,116
Average daily mileage of box cars on Norfolk and Western Railway	22.71	22.24
Mileage of Norfolk and Western coal cars on Norfolk and Western Railway	140,229,117	136,768,201
Average number of coal cars in service on Norfolk and Western Railway	15,219	12,912
Average daily mileage of coal cars on Norfolk and Western Railway	25.24	28.42
Total Norfolk and Western freight car mileage on Norfolk and Western Railway in transportation of freight	197,151,965	187,327,263
Average number of Norfolk and Western freight cars in service	35,184	32,724
Average number of Norfolk and Western freight cars in service on Norfolk and Western Railway	22,787	18,777
Average daily mileage on Norfolk and Western Railway	23.70	27.33

NORFOLK AND WESTERN RAILWAY COMPANY.

General Balance Sheet, June 30th, 1908

ASSETS.

			Comparison with June 30th, 1907.
COST OF ROAD AND EQUIPMENT:—			
Railroad franchises and other property,	\$154,311,638 63		I. \$2,790,425 61
Rolling stock	15,830,194 88		I. 3,347,173 63
		\$170,141,833 51	
ADVANCES FOR CONSTRUCTION:—			
CONCORD AND FOREST BRANCHES			D. 1,381,142 76
BLACKSTONE AND LUNENBURG RAIL- ROAD COMPANY		51,182 09	I. 2,613 61
BIG STONY RAILWAY COMPANY		156,327 46	I. 145,789 55
INTERIOR AND WEST VIRGINIA RAIL- ROAD COMPANY		314,730 19	I. 259,730 09
POCAHONTAS AND WESTERN RAILROAD COMPANY		411,523 44	I. 98,232 78
GUYANDOT AND TUG RIVER RAILROAD COMPANY		205,172 47	I. 10,185 05
BARKER AND CLARKS GAP RAILROAD COMPANY		69 40	I. 69 40
CLEAR FORK AND OCEANA RAILROAD COMPANY		22 12	I. 22 12
WEST VIRGINIA SOUTHWESTERN RAIL- WAY		151,655 07	
CARETTA RAILWAY COMPANY		10,386 59	I. 10,386 59
EQUIPMENT LEASED UNDER TRUST AGREEMENTS, LESS, AMOUNTS PAID OUT OF INCOME		14,476,585 01	I. 2,576,585 01
EQUIPMENT UNDER LEASES FROM VIR- GINIA COMPANY			D. 3,500,000 00
COMPANY'S SECURITIES OWNED:—			
Adjustment preferred stock	\$8,300 00		D. 600 00
Common stock	1,530,800 00		
First consolidated mortgage bonds	13,000 00		
Divisional first lien and general mort- gage bonds	10,000,000 00		I. 10,000,000 00
		11,552,100 00	
EQUIPMENT TRUST CERTIFICATES OWNED		3,600,000 00	I. 3,600,000 00
INVESTMENTS IN OTHER COMPANIES		3,681,738 05	I. 2,753,501 87
ACCOUNTS RECEIVABLE:—			
Station agents	\$567,018 35		D. 389,015 77
Traffic balances	663,401 17		D. 236,547 69
United States Government	72,264 96		I. 3,092 16
Individuals and companies	823,653 71		D. 151,508 13
Proceeds of Convertible Bonds (De- ferred instalment)			D. 4,076,000 00
		2,126,338 19	
INSURANCE PAID IN ADVANCE		33,889 47	D. 12,555 79
MATERIAL AND SUPPLIES		2,778,175 52	D. 674,511 87
POCAHONTAS COAL AND COKE COMPANY —CASH ADVANCES FOR ADDITIONAL REAL ESTATE		906,000 00	D. 19,000 00
VIRGINIA COMPANY			D. 172,713 74
CASH		6,019,352 16	I. 1,606,085 34
		\$216,797,060 74	I. \$16,590,297 06

*Includes Lynchburg Belt Line and Connecting Railway Company 5% Bond for \$2,748,780.28 referred to on page 13.

NORFOLK AND WESTERN RAILWAY COMPANY.

General Balance Sheet, June 30th, 1908.

LIABILITIES.

			Comparison with June 30th, 1907.
CAPITAL STOCK :—			
Adjustment preferred	\$23,000,000 00		
Common	66,000,000 00	\$89,000,000 00	
FUNDED DEBT :—			
South Side Railroad Company consolidated mortgage bonds	\$1,000 00		
Virginia and Tennessee Railroad Company enlarged mortgage bonds	5,000 00		
Norfolk and Western Railroad Co. : General mortgage 6 per cent. bonds	7,283,000 00		
New River Division first mortgage 6 per cent. bonds	2,000,000 00		
Improvement and Extension mortgage 6 per cent. bonds	5,000,000 00		
Scioto Valley and New England R. R. Co. first mortgage 4 per cent. bonds	5,000,000 00		
Columbus Connecting and Terminal R. R. Co. 5 per cent. mortgage bonds	600,000 00		
Norfolk and Western Railway Co. : First consolidated mortgage 4 per cent. bonds	40,400,500 00		
Divisional first lien and general mortgage 4 per cent. bonds	23,000,000 00		I. \$10,000,000 00
Convertible 10-25 year 4 per cent. bonds	14,576,000 00	97,865,500 00	
OUTSTANDING EQUIPMENT TRUST CERTIFICATES FOR LEASED EQUIPMENT		13,900,000 00	I. 2,000,900 00
NORFOLK AND WESTERN RAILWAY CO. 5 PER CENT. TWO-YEAR COLLATERAL NOTES		7,500,000 00	I. 7,500,000 00
INTEREST ON FUNDED DEBT, EQUIPMENT TRUST CERTIFICATES AND COLLATERAL NOTES ACCRUED BUT NOT MATURED		1,186,227 00	I. 65,775 33
LYNCHBURG BELT LINE AND CONNECTING RAILWAY CO. CONSTRUCTION		229,595 69	I. 229,595 69
ACCOUNTS PAYABLE :—			
Pay rolls	\$822,593 60		D. 452,042 90
Audited vouchers	690,242 20		D. 1,508,500 92
Traffic balances	47,726 85		D. 64,819 70
Individuals and companies	309,289 36	1,869,851 91	I. 180,752 90
TAXES ACCRUED		489,859 83	I. 37,798 27
RESERVES :—			
Equipment renewal			D. 291,318 70
Rail renewal			D. 157,349 56
Cross tie renewal			D. 28,565 42
Betterments		283,254 45	D. 921,394 22
PROFIT AND LOSS		4,472,771 86	I. 366 29
		\$216,797,060 74	I. \$16,590,297 06

Table No. 3.

Analysis of Earnings and Expenses of the Norfolk and Western Railway Company for the Year ending June 30th, 1908.

	PASSENGER ACCOUNT.			FREIGHT ACCOUNT.		
	Amount.	Rate in Cents. Per Pass'r per Mile.	Per Train per Mile.	Amount.	Rate in Cents. Per Ton per Mile.	Total Amount
Earnings from passengers	\$3,977,482 05	1.900	100.07			\$3,977,482 05
" " freight						23,990,829 53
" " express	449,324 36	.215	11.30	\$23,990,829 53	.481	449,324 36
" " U. S. mail	290,577 85	.139	7.31			290,577 85
" " miscellaneous sources	80,893 33	.039	2.04	173,310 03	.004	254,203 36
Total gross earnings	\$4,798,277 59	2.293	120.72	\$24,163,939 56	.485	\$28,962,217 15
Expenses (operating) :—						
Maintenance of way and structures	\$682,421 99	.326	17.17	\$2,775,666 00	.056	\$3,458,087 99
" " equipment	562,088 90	.269	14.14	4,120,991 37	.083	4,683,080 27
Traffic expenses	118,356 41	.057	2.98	357,249 48	.007	475,605 89
Conducting transportation	1,599,507 28	.764	40.24	7,746,541 39	.155	9,346,048 67
General expenses	111,871 52	.053	2.81	484,792 98	.010	596,664 50
Total expenses	\$3,074,246 10	1.469	77.34	\$15,485,241 22	.311	\$18,559,487 32
Net earnings	\$1,724,031 49	.824	43.38	\$9,678,698 34	.174	\$10,402,729 83
Ratio of expenses to earnings	64.07 per cent.			64.08 per cent.		64.08 per cent.
Total mileage of revenue trains	3,974,864 miles.			8,729,553 miles.		
Total lading of revenue trains	4,824,650 passengers.			19,808,190 tons.		
Total passenger or freight mileage	200,279,408 passengers one mile.			4,985,915,528 tons one mile.		
Average haul of passenger or freight	43.38 miles per passenger.			267.94 miles per ton.		

Table No. 6.
General Summary of Passenger Transportation on the Norfolk and Western Railway for the year ending June 30th, 1908.

POINTS FROM AND TO.	Local or Through Business.	TOTALS.			Earnings per Passenger per Mile. (Cents.)	Average Distance Carried.
		Passengers Carried.	Passengers One Mile.	Earnings.		
Local to local	Local	4,469,118	147,345,664	\$2,869,041 19	1.947	33.0
Local to foreign	"	163,077	27,436,620	472,868 15	1.723	168.2
Foreign to local	"	159,898	26,830,315	456,670 13	1.702	168.0
Total local business		4,791,893	201,612,799	\$3,798,579 47	1.894	42.1
Foreign to foreign	Through	32,757	7,666,609	178,902 58	2.334	234.0
Grand total		4,824,650	209,279,408	\$3,977,482 05	1.901	43.4

General Summary of Freight Transportation on the Norfolk and Western Railway for the year ending June 30th, 1908.

POINTS FROM AND TO.	Local or Through Business.	TOTALS.			Earnings per Ton per Mile. (Cents.)	Average Distance Carried.
		Tons Carried.	Tons One Mile.	Earnings.		
Local to local	Local	4,688,379	777,482,511	\$5,431,374 19	.699	165.8
Local to foreign	"	10,326,975	3,174,275,991	12,234,930 22	.385	307.4
Foreign to local	"	1,747,780	413,617,612	3,140,411 18	.759	236.7
Total local business		16,764,134	4,365,376,114	\$20,806,715 59	.477	260.4
Foreign to foreign	Through	1,844,056	620,539,414	3,182,913 94	.513	336.5
Grand total		18,608,190	4,985,915,528	\$23,990,629 53	.481	267.9

Table No. 7.

Classification of Freight carried on the Norfolk and Western Railway for the year ending June 30th, 1908, as compared with same period previous year (net tons).

CLASSES.	1907-1908.	1906-1907.	Inc. or Dec. in 1907-1908.	
			Increase.	Decrease.
PRODUCTS OF AGRICULTURE.				
Grain	337,425	380,251		42,826
Flour	155,863	180,207		24,344
Other mill products	105,773	96,357	9,416	
Hay	130,185	159,124		28,938
Tobacco	91,628	117,140		25,512
Cotton	24,308	44,470		20,162
Fruit and vegetables	137,432	124,860	12,772	
Peanuts	36,770	36,199	571	
Other products of agriculture	15,254	15,135	119	
PRODUCTS OF FORESTS.				
Lumber	1,540,492	1,968,739		428,247
Cord wood	99,386	117,728		18,342
Other products of forests	179,535	79,623	99,912	
PRODUCTS OF ANIMALS.				
Live stock	64,314	64,681		367
Dressed meats	17,049	16,887	162	
Other packing-house products	63,304	53,817	9,487	
Poultry, game, and fish	1,862	1,576	286	
Wool	3,083	5,623		2,540
Hides and leather	35,481	32,357	3,124	
Other products of animals	1,550	2,886		1,336
PRODUCTS OF MINES.				
Anthracite coal	36,918	38,694		1,776
Bituminous coal	9,683,050	9,361,738	321,312	
Coke	2,147,010	2,413,803		266,793
Ores	688,560	968,039		279,479
Stone, sand and other articles	283,869	235,531	48,338	
Limestone	200,639	360,791		160,152
Other products of mines	172,311	289,854		117,543
MANUFACTURES.				
Petroleum and other oils	57,576	62,645		5,069
Sugar	73,425	90,134		16,709
Naval stores	756	448	308	
Iron—pig and bloom	315,825	581,227		265,402
Iron and steel rails	66,106	82,568		16,462
Other castings and machinery	158,597	234,574		75,977
Bar and sheet metal	116,663	206,510		89,847
Cement, brick and lime	403,005	510,645		107,640
Fertilizer	113,991	102,005	11,986	
Agricultural implements	31,887	17,788	14,099	
Wagons, carriages, tools, etc.	14,352	21,276		6,924
Wines, liquors, and beers	38,012	39,077		1,065
Household goods and furniture	51,433	188,416		136,983
Other manufactures	526,790	96,690	430,100	
Merchandise	225,354	399,077		173,723
Miscellaneous: Other commodities not mentioned above	161,367	384,228		222,861
Total tonnage	18,606,190	20,183,218	961,992	2,537,020
Net dec. for year ending June 30th, 1908,				1,575,028

Exhibit J. V. & No. 5

GENERAL INCOME ACCOUNT

For the Year Ending June 30th, 1909, and Comparison with Previous Year.

	1909.	1909.	1908.	Increase or Decrease.
EARNINGS.				
From freight	\$24,710,501 12		\$23,990,629 53	I. \$719,861 59
" passengers	3,642,837 04		3,977,482 05	D. 334,645 01
" mail	294,452 54		290,577 85	I. 3,874 69
" express	428,047 36		449,324 36	D. 23,277 00
" miscellaneous	253,173 60		254,203 38	D. 1,029 78
TOTAL EARNINGS		\$29,327,101 66	\$28,962,217 15	I. \$364,884 51
EXPENSES.				
Maintenance of way and structures	\$3,331,888 47		\$3,384,709 39	D. \$52,820 92
Maintenance of equipment	4,919,434 74		4,910,241 68	I. 9,193 06
Traffic expenses	487,106 05		475,578 09	I. 11,527 96
Conducting transportation	8,346,991 94		9,324,276 16	D. 977,284 22
General expenses	644,335 23		669,908 58	D. 25,573 35
OPERATING EXPENSES		\$17,729,756 43	\$18,764,713 90	D. \$1,034,957 47
NET EARNINGS FROM OPERATION		\$11,597,345 23	\$10,197,503 25	I. \$1,399,841 98
To which add:—				
Interest, General Account	\$459,474 57		137,924 80	I. 321,549 77
Rents	84,373 03		51,207 12	I. 3,165 91
Hire of equipment	467,264 63		709,566 76	D. 242,302 13
Income from other sources			22,264 87	D. 22,264 87
		981,112 23	\$920,963 55	I. \$60,148 68
TOTAL INCOME		\$12,578,457 46	\$11,118,466 80	I. \$1,459,990 66
From which deduct:—				
Interest on funded debt	\$3,985,520 00		3,785,013 34	I. 200,506 66
Interest on Equipment Trust obligations	378,666 66		442,666 66	D. 64,000 00
Interest on 2-year 5 per cent. Collateral Gold Notes	379,045 63		62,500 00	I. 316,545 63
Taxes	1,008,800 00		1,020,800 00	D. 12,000 00
Rents of tracks, yards, terminals and other property	152,816 96		87,370 51	I. 65,446 45
Miscellaneous	8,175 33			I. 8,175 33
		5,913,024 58	\$5,398,360 51	I. \$514,674 07
NET INCOME		\$6,665,432 88	\$5,720,116 29	I. \$945,316 59

From this net income for the year ending June 30th, 1909 \$6,665,432 88

The following amounts have been deducted:—

Payments to Pocahontas Coal and Coke Company on account of deficiency of interest on Norfolk and Western-Pocahontas Joint Bonds \$150,000 00

Dividends on adjustment preferred shares:

No. 24. 2 per cent., paid February 18th, 1909, \$459,834 00

No. 25. 2 per cent., payable Aug. 18th, 1909, 459,834 00

919,668 00

Dividends on common shares:

No. 16. 2 per cent., paid Dec. 18th, 1908, 1,289,384 00

No. 17. 2 per cent., paid June 18th, 1909, 1,289,384 00

2,578,768 00

Appropriation for betterments to property 1,730,580 35 5,379,016 35

Amount carried to Profit and Loss for the year \$1,286,416 53

Amount to credit of Profit and Loss, June 30th, 1908 4,472,771 66

\$5,759,188 39

Dividend No. 23 on Adjustment Preferred shares paid August 18th, 1908

\$459,834 00

Discount and commission on securities sold 800,000 00 1,259,834 00

Balance to credit of Profit and Loss, June 30th, 1909 \$4,499,354 39

281 NOTE A.—To facilitate comparison, the classification of the charges to the sub-accounts "Equipment Borrowed and Loaned," "Work Equipment," and "Insurance," in operating expenses for the year 1907-8 has been changed to conform to that of the year covered by this report.

NOTE B.—Heretofore the dividend on Adjustment Preferred Stock declared in June, payable in August, was charged to the income of the fiscal year in which it was payable and not to that of the fiscal year in which it was earned. In this report adjustment has been made by charging the dividend payable in August, 1909, to income, and the dividend paid in August, 1908, to Profit and Loss; so that only two dividends on Adjustment Preferred Stock appear as charged against the Income Account of this year.

The gross earnings as reported include an additional sum of \$129,455.20 collected in the previous year, as more particularly described on pages 25 and 26 of this report. The following table compares results of the two years after making the adjustments involved:

	1908-09.	1907-08.
Gross Earnings per mile of road...	\$15,168.00	\$15,466.00
Net Earnings per mile of road...	5,957.00	5,590.00
Ratio of Expenses to Gross Earnings	60.72%	64.50%
Ratio of Taxes to Gross Earnings..	3.46%	3.51%

Capital Stock.

The authorized capital stock of the Company is \$100,000,000 common stock and \$23,000,000 adjustment preferred stock. The outstanding capital stock consists of—

660,000 shares of common stock.....	\$66,000,000 00
230,000 shares of adjustment preferred stock.....	23,000,000 00
Total	\$89,000,000 00

of which there was in the treasury of the Company \$8,300 of adjustment preferred stock and \$1,530,800 of common stock.

283	To meet the cost of extraordinary replacements and betterments to your property there has been appropriated from net income the sum of.....	\$1,730,580 35
	Credit balance in Betterment Fund, June 30th, 1908	283,254 45
	Total	\$2,013,834 80

Against this amount the following expenditures have been charged:

Betterments excluding rolling stock	\$1,341,582 00
Principal of Equipment Trusts.	672,252 74
	<u>\$2,013,834 80</u>

Following is a statement of the Equipment Replacement Account for the fiscal year:—

Credits to Equipment Replacements:

Equipment Depreciation for the year, charged in Operating Expenses	\$1,172,802 71
Equipment destroyed or sold, net value.....	214,900 00
Salvage from Equipment destroyed.....	108,728 93
Total Credits	\$1,496,431 64

Charges:

New Equipment	\$346,011 15
Principal of Equipment Trusts. . .	927,747 26
	<u>1,273,758 41</u>
Credit balance, June 30th, 1909.....	<u>\$222,673 23</u>

Traffic.

As compared with the preceding year, the number of passengers carried increased 94,885, or 2.0 per cent.; the average haul of passengers decreased 8.57 miles.

The total passenger revenue decreased \$334,645.01, or 8.4 per cent.; the average rate per passenger per mile increased 0.227 cents.

Tons of freight carried increased 1,441,013 tons, or 7.7 per cent.; the average haul of freight increased 0.25 miles.

The total freight revenue increased \$719,961.59, or 3.0 per cent.; the average rate per ton per mile decreased 0.021 cents.

The freight train mileage decreased 4,037 miles, or 0.05 per cent.; the average tons per train mile increased 45 tons, or 7.9 per cent.

The coal shipments were 10,978,560 tons, an increase of 1,258,592 tons, or 12.9 per cent.

The lumber shipments were 1,523,518 tons, a decrease of 16,974 tons, or 1.1 per cent.

The shipments of other low-class commodities connected with the iron and steel industries were as follows:—

Coke shipments were 2,260,827 tons, an increase of 113,817 tons, or 5.3 per cent.

Ore shipments were 692,488 tons, an increase of 3,928 tons, or 0.6 per cent.

Pig and bloom iron shipments were 333,762 tons, an increase of 17,937 tons, or 5.7 per cent.

The following statement gives the passenger and freight statistics for the years 1909 and 1908:—

TRAFFIC AND MILEAGE STATISTICS.

FREIGHT TRAFFIC:—

	1908-1909.	1907-1908.	Increase or Decrease.	Per Cent.
Tons of freight carried.....	20,049,303	18,608,190	I. 1,441,013	7.7
Tons carried one mile.....	5,377,020,950	4,985,915,528	I. 391,105,422	7.8
" " per mile of road.....	2,793,258	2,650,673	I. 142,585	5.4
Average distance carried per ton (miles).....	268.19	267.94	I. 0.25	0.1
Total revenue from freight.....	\$24,710,591 12	\$23,990,629 53	I. \$719,961 59	3.0
Average revenue per ton of freight (cents).....	123.25	128.93	D. 5.68	4.4
" " per mile (cents).....	0.460	0.481	D. 0.021	4.4
Total freight earnings.....	\$24,881,320 48	\$24,163,939 56	I. \$717,380 92	3.0
Freight earnings per mile of road.....	\$12,925 36	\$12,846 32	I. \$79 04	0.6
" " train mile (cents).....	285.16	276.81	I. 8.35	3.0

PASSENGER TRAFFIC:—

Passengers carried.....	4,919,535	4,824,650	I. 94,885	2.0
" " one mile.....	171,270,331	209,279,408	D. 38,009,077	18.2
" " per mile of road.....	88,972	111,260	D. 22,288	20.0
Average distance carried per passenger (miles).....	34.81	43.38	D. 8.57	19.8
Total passenger revenue.....	\$3,642,837 04	\$3,977,182 05	D. \$334,645 01	8.4
Average revenue from passengers (cents).....	74.05	82.44	D. 8.39	10.2
Average revenue per passenger per mile (cents).....	2.137	1.900	I. 0.227	11.9
Total passenger earnings.....	\$4,445,781 18	\$4,798,277 59	D. \$352,496 41	7.8
Passenger earnings per mile of road.....	\$2,309 50	\$2,550 92	D. \$241 42	9.5
" " train mile (cents).....	118.12	120.72	D. 2.60	2.2

* Includes \$139,455.20, collected in the preceding year, as explained on pages 25 and 26.

TRAFFIC AND MILEAGE STATISTICS.

TOTAL TRAFFIC:—

	1908-1909.	* 1907-1908.	Increase or Decrease.	Per Cent.
Gross earnings.....	\$29,327,101 66	\$28,962,217 15	I. \$364,884 51	1.3
" " per mile of road.....	\$15,234 86	\$15,397 24	D. \$162 38	1.1
" " " train mile (cents).....	234.82	231.10	I. 3.72	1.6
Operating expenses.....				
Freight.....	\$14,838,663 59	\$15,690,651 08	D. \$851,987 49	5.4
Passenger.....	\$2,891,092 84	\$3,074,062 82	D. \$182,969 98	6.0
Total.....	\$17,729,756 43	\$18,764,713 90	D. \$1,034,957 47	5.5
Per mile of road, freight.....	\$7,708 39	\$8,841 65	D. \$633 26	7.6
" " " passenger.....	\$1,501 87	\$1,634 27	D. \$132 40	8.1
" " " Total.....	\$9,210 26	\$9,975 92	D. \$765 66	7.7
Per train mile, freight (cents).....	170.06	179.74	D. 9.68	5.4
" " " passenger (cents).....	76.81	77.34	D. 0.53	0.7
" " " Total (cents).....	141.96	147.70	D. 5.74	3.9
Per ton per mile (cents).....	0.276	0.315	D. 0.039	12.4
" passenger per mile (cents).....	1.688	1.469	I. 0.219	14.9
Net earnings:				
Freight.....	\$10,042,656 89	\$8,473,288 48	I. \$1,569,368 41	18.5
Passenger.....	\$1,554,688 34	\$1,724,214 77	D. \$169,526 43	9.8
Total.....	\$11,597,345 23	\$10,197,503 25	I. \$1,399,841 98	13.7
Per mile of road, freight.....	\$5,216 97	\$4,504 67	I. \$712 30	15.8
" " " passenger.....	\$807 63	\$916 65	D. \$109 02	11.9
" " " Total.....	\$6,024 60	\$5,421 32	I. \$603 28	11.1
Per train mile, freight (cents).....	115.10	97.06	I. 18.14	18.7
" " " passenger (cents).....	41.31	43.38	D. 2.07	4.8
" " " Total (cents).....	92.86	80.27	I. 12.59	15.7
Per ton per mile (cents).....	0.187	0.170	I. 0.017	10.0
" passenger per mile (cents).....	0.908	0.824	I. 0.084	10.2

* See Note A at top of page 8

TRAFFIC AND MILEAGE STATISTICS.	1908-1909.	1907-1908.	Increase or Decrease.	Per Cent.
TRAIN MILEAGE:—				
Of revenue freight trains.....	8,548,948	8,557,450	D. 8,502	0.1
" revenue passenger trains.....	3,587,179	3,802,761	D. 215,582	5.7
" revenue mixed trains.....	176,568	172,103	I. 4,465	2.6
" revenue special trains.....	4,827	4,970	D. 143	2.9
" non-revenue trains.....	475,845	506,757	D. 30,912	6.1
Made by all trains.....	12,793,367	13,044,041	D. 250,674	1.9
LOCOMOTIVE MILEAGE:—				
Of revenue freight trains.....	12,401,584	12,783,573	D. 331,989	2.6
" revenue passenger trains.....	3,754,919	4,011,983	D. 257,064	6.4
" revenue mixed trains.....	184,092	180,048	I. 4,044	2.2
" revenue special trains.....	6,485	6,185	I. 300	4.9
" switching locomotives.....	2,492,618	2,994,575	D. 501,957	16.8
" non-revenue trains.....	536,632	567,977	D. 31,245	5.5
" all locomotives.....	19,876,330	20,494,341	D. 1,118,011	5.5
CAR MILEAGE:—				
Mileage of loaded freight cars:				
North and East.....	98,750,697	99,336,054	D. 585,357	.5
South and West.....	98,128,217	83,712,120	I. 9,416,097	11.2
Mileage of empty freight cars:				
North and East.....	60,460,159	51,614,887	I. 8,845,272	17.1
South and West.....	63,008,681	63,033,431	D. 24,750	.04
Mileage of caboose cars:				
North and East.....	4,307,422	4,291,175	I. 15,247	.4
South and West.....	4,237,093	4,247,355	D. 10,262	.2
Average number freight cars per train mile excluding caboose...	36.14	34.10	I. 2.04	6.0
Average number loaded freight cars per train mile.....	21.99	20.97	I. 1.02	4.9
Average number empty freight cars per train mile excluding caboose.....	14.15	13.13	I. 1.02	7.8
Average number tons freight per train mile.....	616	571	I. 45	7.9
Average number tons freight per loaded car mile.....	28.02	27.24	I. .78	.03
Mileage of passenger cars.....	19,709,897	21,842,100	D. 2,132,203	9.7
Average number passenger cars per train mile.....	5.24	5.50	D. .26	.05
Average number of passengers per train mile.....	46	53	D. 7	13.3
Mileage of cars in special service	64,891	58,339	I. 6,552	11.2
Average mileage operated during year.....	1,925	1,881	I. 44	2.3

Summary of Freight and Passenger Car Mileage.

	Year ending June 30th.	
	1909.	1908.
Mileage of Norfolk and Western freight cars on Norfolk and Western Railway (including caboose).	228,816,345	204,641,146
Mileage of foreign freight cars on Norfolk and Western Railway	95,075,924	101,595,157
Percentage of freight car mileage made by foreign cars	29.35	33.18
Mileage of Norfolk and Western box cars on Norfolk and Western Railway	39,001,480	31,056,121
Average number of box cars in service on Norfolk and Western Railway	4,128	3,747
Average daily mileage of box cars on Norfolk and Western Railway	25.90	22.71
Mileage of Norfolk and Western coal cars on Norfolk and Western Railway	153,051,982	140,229,117
Average number of coal cars in service on Norfolk and Western Railway	15,268	15,219
Average daily mileage of coal cars on Norfolk and Western Railway	27.46	25.24
Total Norfolk and Western freight car mileage on Norfolk and Western Railway in transportation of freight	221,004,127	197,151,965
Average number of Norfolk and Western freight cars in service	34,005	35,184
Average number of Norfolk and Western freight cars in service on Norfolk and Western Railway	23,085	22,787
Average daily mileage on Norfolk and Western Railway	26.25	23.70
Total passenger car mileage on Norfolk and Western Railway	19,709,897	21,842,100
Mileage of Norfolk and Western passenger cars on Norfolk and Western Railway	15,050,154	16,720,104
Mileage of Norfolk and Western passenger cars on foreign lines	1,107,312	1,208,035
Total mileage made by Norfolk and Western passenger cars	16,166,476	17,928,139
Mileage of foreign passenger cars (including Pullman) on Norfolk and Western Railway	4,650,743	5,121,996
Percentage of passenger car mileage made by foreign cars	23.60	23.45

289 Recovery from the recent business depression has made substantial progress and already indicates that the limit of economical and efficient operation on parts of your Line has again been reached. As rapidly as financial conditions warranted, the partially suspended work of double tracking in West Virginia and Ohio was resumed. Much of it has been completed and is now in operation; the balance is progressing rapidly. After the work now authorized is completed there will remain 64 miles of single track in Ohio and 21 miles in West Virginia which must be converted into double track as rapidly as possible, to enable your management to meet the requirements of business confronting your Company.

NORFOLK AND WESTERN RAILWAY COMPANY.

General Balance Sheet, June 30th, 1909.

ASSETS.

			Comparison with June 30th, 1908.
COST OF ROAD AND EQUIPMENT:—			
Railroad franchises and other property,	\$155,810,477 06		I. \$1,498,838 43
Rolling stock	15,830,194 88		
		\$171,640,671 94	
ADVANCES FOR CONSTRUCTION:—			
BLACKSTONE AND LUNENBURG RAIL- ROAD COMPANY		51,184 09	I. 2 00
BIG STONY RAILWAY COMPANY		210,597 87	I. 54,270 41
INTERIOR AND WEST VIRGINIA RAIL- ROAD COMPANY		593,455 17	I. 278,724 66
POCAHONTAS AND WESTERN RAILROAD COMPANY		413,823 44	I. 2,300 00
GUYANDOT AND TUG RIVER RAILROAD COMPANY		216,259 34	I. 10,995 35
WEST VIRGINIA SOUTHWESTERN RAIL- WAY			D. 151,655 07
CARETTA RAILWAY COMPANY			D. 10,386 59
WINSTON-SALEM SOUTH BOUND RAIL- WAY COMPANY		105,834 66	I. 105,834 66
EQUIPMENT LEASED UNDER TRUST AGREEMENTS, LESS AMOUNTS PAID OUT OF INCOME		12,876,585 01	D. 1,600,000 00
COMPANY'S SECURITIES OWNED:—			
Adjustment preferred stock	\$8,300 00		
Common stock	1,530,800 00		
First consolidated mortgage bonds	13,000 00		
Divisional first lien and general mort- gage bonds			D. 10,000,000 00
		1,552,100 00	
EQUIPMENT TRUST CERTIFICATES OWNED		3,200,000 00	D. 400,000 00
INVESTMENTS IN OTHER COMPANIES		3,872,314 59	I. 10,576 54
ACCOUNTS RECEIVABLE:—			
Station agents	\$563,639 15		D. 3,379 20
Traffic balances	942,492 17		I. 279,091 00
United States Government	24,651 08		D. 47,613 88
Individuals and Companies	884,960 14		I. 61,306 43
Norfolk & Western Railway Company 5% Two-Year Collateral Notes Pur- chased (to be delivered to Trustee)	246,000 00		I. 246,000 00
		2,661,742 54	
INSURANCE PREMIUMS PAID IN ADVANCE		57,776 61	I. 23,907 14
MATERIAL AND SUPPLIES		2,576,611 77	D. 201,563 75
POCAHONTAS COAL AND COKE COMPANY —CASH ADVANCES FOR ADDITIONAL REAL ESTATE		1,059,000 00	I. 153,000 00
CASH DEPOSITED IN TRUST FOR RE- DEMPTION OF OUTSTANDING 5% TWO- YEAR COLLATERAL NOTES		6,386,000 00	I. 6,386,000 00
CASH		*7,555,841 76	I. 1,536,489 60
		\$215,029,798 79	D. \$1,787,261 96

* Includes \$4,000,000. of special deposits on interest-bearing short time certificates.

NORFOLK AND WESTERN RAILWAY COMPANY.

General Balance Sheet, June 30th, 1909.

LIABILITIES.

CAPITAL STOCK :—		Comparison with June 30th, 1908.
Adjustment preferred	\$23,000,000 00	
Common	66,000,000 00	
FUNDED DEBT :—		\$89,000,000 00
South Side Railroad Company consolidated mortgage bonds	\$1,000 00	
Virginia and Tennessee Railroad Company enlarged mortgage bonds	5,000 00	
Norfolk and Western Railroad Co. : General mortgage 6 per cent. bonds	7,283,000 00	
New River Division first mortgage 6 per cent. bonds	2,000,000 00	
Improvement and Extension mortgage 6 per cent. bonds	5,000,000 00	
Scioto Valley and New England R. R. Co. first mortgage 4 per cent. bonds	5,000,000 00	
Columbus Connecting and Terminal R. R. Co. 5 per cent. mortgage bonds	600,000 00	
Norfolk and Western Railway Co. : First consolidated mortgage 4 per cent. bonds	40,400,500 00	
Divisional first lien and general mortgage 4 per cent. bonds	23,000,000 00	
Convertible 10-25 year 4 per cent. bonds	14,576,000 00	
	97,865,500 00	
OUTSTANDING EQUIPMENT TRUST CERTIFICATES FOR LEASED EQUIPMENT.	11,900,000 00	D. \$2,000,000 00
NORFOLK AND WESTERN RAILWAY CO. 5 PER CENT. TWO-YEAR COLLATERAL NOTES	6,386,000 00	D. 1,114,000 00
INTEREST ON FUNDED DEBT, EQUIPMENT TRUST CERTIFICATES AND COLLATERAL NOTES ACCRUED BUT NOT MATURED	842,458 33	D. 343,766 67
LYNCHBURG BELT LINE AND CONNECTING RAILWAY CO. CONSTRUCTION	209,310 77	D. 20,284 92
ACCOUNTS PAYABLE :—		
Pay rolls	\$1,027,707 38	I. 205,113 88
Audited vouchers	1,304,842 68	I. 674,600 48
Traffic balances	66,905 90	I. 19,179 05
Individuals and companies	688,207 39	I. 378,918 03
	3,147,663 35	
DIVIDEND NO. 25 ON ADJUSTMENT PREFERRED SHARES PAYABLE AUGUST 18TH, 1909	459,834 00	I. 459,834 00
TAXES ACCRUED	497,004 72	I. 7,144 80
RESERVES :—		
Equipment replacements	222,673 23	I. 222,673 23
Betterments		D. 283,254 45
PROFIT AND LOSS	4,499,354 39	I. 26,582 53
	\$215,029,798 79	D. \$1,767,281 95

Table No. 3.
*Analysis of Earnings and Expenses of the Norfolk and Western Railway Company for the
 Year ending June 30th, 1909.*

	FREIGHT ACCOUNT.			PASSENGER ACCOUNT.			Total Amount.
	Amount.	Rate in Cents. Per Ton per Mile.	Per Train per Mile.	Amount.	Rate in Cents. Per Pass'r per Mile.	Per Train per Mile.	
Earnings from freight	\$24,710,591 12	.460	283 20				\$24,710,591 12
" " passengers				\$3,642,837 04	2.127	96.79	3,642,837 04
" " express				426,047 36	.249	11.32	426,047 36
" " U. S. mail				294,452 54	.172	7.82	294,452 54
" " miscellaneous sources	170,729 36	.003	1.96	82,444 24	.048	2.19	253,173 60
Total gross earnings	\$24,881,320 48	.463	285.16	\$4,445,781 18	2.596	118.12	\$29,327,101 66
Expenses (operating) :—							
Maintenance of way and structures	\$2,672,956 78	.050	30.63	\$658,931 69	.385	17.51	\$3,331,888 47
" " equipment	4,370,722 83	.081	50.09	548,711 91	.320	14.58	4,919,434 74
Traffic expenses	376,038 83	.007	4.31	111,067 22	.065	2.95	487,106 05
Conducting transportation	6,890,293 87	.128	78.97	1,456,698 07	.850	38.70	8,346,991 94
General expenses	528,651 28	.010	6.06	115,683 95	.068	3.07	644,335 23
Total expenses	\$14,838,663 59	.276	170.06	\$2,891,092 84	1.688	76.81	\$17,729,756 43
Net earnings	\$10,042,656 89	.187	115.10	\$1,554,688 34	.908	41.31	\$11,597,345 23
Ratio of expenses to earnings	59.64 per cent.			65.03 per cent.			60.46 per cent.
Total mileage of revenue trains	8,725,516 miles.			3,763,747 miles.			
Total lading of revenue trains	20,049,203 tons.			4,919,585 passengers.			
Total freight or passenger mileage	5,377,020,950 tons one mile.			171,270,331 passengers one mile			
Average haul of freight or passenger	268.16 miles per ton.			34.81 miles per passenger.			

* Includes \$139,450.50, collected in the preceding year, as explained on pages 25 and 26.

Table No. 6.
General Summary of Freight Transportation on the Norfolk and Western Railway for the year
ending June 30th, 1909.

POINTS FROM AND TO.	Local or Through Business.	TOTALS.			Average Distance Carried.
		Tons Carried.	Tons One Mile.	Earnings.	
Local to local	Local	4 071,592	567,344,956	\$4,392,008 15	139.3
Local to foreign	"	12,291,055	3,741,131,245	13,907,013 21	.370
Foreign to local	"	1,802,751	410,926,979	3,072,112 44	304.4
Total local business		18,165,398	4,719,406,180	\$21,371,133 80	227.9
Foreign to foreign	Through	1,883,805	657,614,770	3,339,457 32	259.8
Grand total		20,049,203	5,377,020,950	\$24,710,591 12	349.1
				460	268.2

General Summary of Passenger Transportation on the Norfolk and Western Railway for the year
ending June 30th, 1909.

POINTS FROM AND TO.	Local or Through Business.	TOTALS.			Average Passenger per Mile. (Cents.)
		Passengers Carried.	Passengers One Mile.	Earnings.	
Local to local	Local	4,611,602	127,786,281	\$2,777,452 74	27.7
Local to foreign	"	130,860	16,743,651	329,622 99	128.0
Foreign to local	"	134,221	17,481,912	340,191 99	130.2
Total local business		4,876,683	162,011,844	\$3,447,267 72	33.2
Foreign to foreign	Through	42,852	9,258,487	195,569 32	216.1
Grand total		4,919,535	171,270,331	\$3,642,837 04	34.8
				2,127	

* Includes \$129,455.20, collected in the previous year, as explained on pages 25 and 26.

Table No. 7.

Classification of Freight carried on the Norfolk and Western Railway for the year ending June 30th, 1909, Compared with same period previous year (net tons).

CLASSES.	1908-1909.	1907-1908.	Inc. or Dec. in 1908-1909.	
			Increase.	Decrease.
PRODUCTS OF AGRICULTURE.				
Grain	295,956	337,425		41,469
Flour	160,015	155,863	4,152	
Other mill products	99,895	105,773		5,878
Hay	133,059	130,185	2,874	
Tobacco	97,345	91,628	5,717	
Cotton	43,283	24,308	18,975	
Fruit and vegetables	123,478	137,432		13,954
Peanuts	32,464	36,770		4,306
Other products of agriculture	15,918	15,254	664	
PRODUCTS OF FORESTS.				
Lumber	1,523,518	1,540,492		16,974
Cord wood	37,429	99,386		61,957
Other products of forests	172,290	179,535		7,245
PRODUCTS OF ANIMALS.				
Live stock	64,873	64,314	559	
Dressed meats	18,534	17,049	1,485	
Other packing-house products	51,705	63,304		11,599
Poultry, game, and fish	3,990	1,862	2,128	
Wool	6,576	3,083	3,493	
Hides and leather	36,056	35,481	575	
Other products of animals	5,541	1,550	3,991	
PRODUCTS OF MINES.				
Anthracite coal	21,789	36,918		15,129
Bituminous coal	10,956,771	9,683,050	1,273,721	
Coke	2,260,827	2,147,010	113,817	
Ores	692,488	688,560	3,928	
Stone, sand and other like articles	439,286	283,869	155,417	
Limestone	215,883	200,639	15,244	
Other products of mines	79,377	172,311		92,934
MANUFACTURES.				
Petroleum	48,348	57,576		9,228
Sugar	104,314	73,425	30,889	
Naval stores	349	766		417
Iron—pig and bloom	333,762	315,885	17,877	
Iron and steel rails	51,199	66,106		14,907
Other castings and machinery	194,799	156,597	36,112	
Bar and sheet metal	123,488	116,663	6,825	
Cement, brick and lime	429,441	403,005	26,436	
Fertilizer	119,416	113,991	5,425	
Agricultural implements	25,672	31,887		6,215
Wagons, carriages, tools, etc.	13,366	14,352		986
Wines, liquors, and beers	33,410	38,012		4,602
Household goods and furniture	49,540	51,433		1,893
Other manufactures	632,699	526,790	105,909	
Merchandise	170,079	225,354		55,275
Miscellaneous: Other commodities not mentioned above	131,065	161,367		30,302
Total tonnage	20,049,203	18,608,180	1,836,273	396,280
Net inc. for year ending June 30th, 1909.			1,441,013	

Exhibit J. H. 6 No. 6.

7

GENERAL INCOME ACCOUNT

For the Year Ending June 30th, 1910, and Comparison with Previous Year.

OPERATING REVENUES	1910.	1910.	1909.	Increase or Decrease.
From freight	\$30,037,796 22		\$24,710,591 12	I. \$5,327,205 10
" passengers	3,924,889 67		3,642,837 04	I. 282,052 63
" mail	338,449 10		294,452 54	I. 43,996 56
" express	461,855 25		426,047 36	I. 35,807 89
" miscellaneous	301,080 18		253,173 60	I. 47,906 58
TOTAL OPERATING REVENUES		\$35,063,870 42	\$29,327,101 66	I. \$5,736,768 76
OPERATING EXPENSES.				
Maintenance of way and structures	\$3,752,045 16		\$3,331,888 47	I. \$420,156 69
Maintenance of equipment	5,951,907 15		4,919,434 74	I. 1,032,472 41
Traffic expenses	551,806 15		487,106 05	I. 64,700 10
Conducting transportation, General expenses	10,069,726 22		8,346,991 94	I. 1,722,734 26
	721,275 01		644,335 23	I. 76,939 78
TOTAL OPERATING EXPENSES		21,046,759 69	\$17,729,756 43	I. \$3,317,003 26
NET OPERATING REVENUE		\$14,017,110 73	\$11,597,345 23	I. \$2,419,765 50
To which add:—				
Interest, General Account	\$534,121 23		\$459,474 57	I. \$74,646 66
Rents	57,148 85		54,373 03	I. 2,775 82
Hire of equipment	554,938 54		467,264 63	I. 87,673 91
		1,146,208 62	981,112 23	I. \$165,094 39
TOTAL INCOME		\$15,163,317 35	\$12,578,457 46	I. \$2,584,859 89
From which deduct:—				
Interest on funded debt	\$4,179,530 00		\$3,985,520 00	I. \$194,010 00
Interest on Equipment Trust obligations	395,555 56		378,666 66	I. 16,888 90
Interest on 2-year 5 per cent. Collateral Gold Notes	206,154 37		379,045 63	D. 172,891 26
Taxes	1,118,964 59		1,008,800 00	I. 110,164 59
Rents of tracks, yards, terminals and other property, Miscellaneous	122,237 96		152,818 96	D. 30,579 00
	97,709 72		8,175 33	I. 89,534 39
		6,120,152 20	\$5,913,024 56	I. \$207,127 62
NET INCOME		\$9,043,165 15	\$6,665,432 88	I. \$2,377,732 27
Deduct expenditures to maintain earning power and offset obsolescence		3,573,598 32	1,730,580 35	I. 1,843,017 97
Balance		\$5,469,566 83	\$4,934,852 53	I. \$534,714 30
From this balance for the year ending June 30th, 1910				\$5,469,566 83
The following amounts have been deducted:—				
Payments to Pocahontas Coal and Coke Company on account of deficiency of sinking fund and interest on Norfolk and Western-Pocahontas Joint Bonds			\$138,000 00	
Cash dividends on Capital Stock:				
Adjustment Preferred Stock, 4 per cent.			919,668 00	
Common Stock, 3 per cent.			3,294,842 50	
				4,352,510 50
Amount carried to Profit and Loss for the year				\$1,117,056 33
Amount to credit of Profit and Loss, June 30th, 1909				4,499,354 39
Total				\$5,616,410 72
Discount, commission and premium on securities sold—balance				41,878 08
Balance to credit of Profit and Loss, June 30th, 1910				\$5,574,532 64

296 Following is a comparative table of average results for two years:

	1909-10.	1908-09.
Total Operating Revenues per mile of road.	\$18,028	\$15,168
Net Operating Revenue per mile of road.	7,207	5,957
Ratio of Expenses to Operating Revenues.	60.02%	60.72%
Ratio of Taxes to Operating Revenues.	3.19%	3.46%

Capital Stock.

The authorized capital stock of the Company is \$100,000,000 common stock and \$23,000,000 adjustment preferred stock. The outstanding capital stock at the close of the fiscal year consisted of—

688,960 shares of common stock	\$68,896,000
230,000 shares of adjustment preferred stock	23,000,000
Total	\$91,896,000

of which there was in the treasury \$8,300 of adjustment preferred stock. The increase in the outstanding common stock was caused by the issue of 28,960 shares in exchange for \$2,896,000 of the Company's Convertible 10-25 year 4 per cent. gold bonds surrendered for conversion.

A favorable opportunity having arisen in December, 1909, the Company sold at a price slightly above par the 15,308 shares of its common stock held in the treasury since 1897.

II

ROAD AND EQUIPMENT EXPENDITURES.

The expenditures for road and equipment summarized below aggregated \$13,184,434.78, all of which, in accordance with the order of the Interstate Commerce Commission, has been charged to your Company's Property Investment accounts. Of this sum \$2,573,598.32 consists of expenditures which, in the judgment of your Board of Directors, were required to offset obsolescence and depreciation, due to changing conditions, and were necessary to maintain the earning capacity and preserve the value of the Company's property, and, therefore, should not be capitalized. The payment of \$3,573,598.32 from income therefore includes that amount and also for the same reason one-half, i. e., \$1,000,000, of the principal of Equipment Trust obligations paid during the year. The resulting net property investment for the year was \$10,610,836.46.

	Net Property Investment.	Payable from Income.	Total.
Branches and extensions	\$3,299,643 21		\$3,299,643 21
Right of way and station grounds	253,797 41	\$166,202 23	419,999 64
Widening cuts and fills		8,833 91	8,833 91
Protection of banks		35,228 87	35,228 87
Grade revision and changes of line	5,691 67	30,165 22	35,856 89
Tunnel improvements		13,514 07	13,514 07
Bridges, trestles and culverts		87,413 75	87,413 75
Increased weight of rail		48,776 67	48,776 67
Improved frogs and switches		1,226 91	1,226 91
Track fastenings and other ma- terial		16,574 68	16,574 68
Additional main tracks	1,557,459 24	1,184,905 18	2,742,364 42
Sidings and spur tracks	167,467 08	21,376 48	192,279 82
Terminal yards	486,552 62	27,627 58	510,743 94
Fencing right of way		23,690 17	23,690 17
Track elevation, elimination of grade crossings, etc.		2,870 11	2,870 11
Interlocking apparatus		37,736 30	37,736 30
Block and other signal apparatus	Cr 5 40	455,427 07	455,421 67
Telegraph and telephone lines		89,809 10	89,809 10
Station buildings and fixtures	100,772 05	39,405 04	140,177 09
Shops, enginehouses and turn- tables	65,388 96	13,082 78	78,471 76
Shop machinery and tools		148,199 05	148,199 05
Water and fuel stations	22,893 29	101,740 14	124,633 43
Grain elevators and storage warehouses	5,093 66		5,093 66
Dock and wharf property	302 03		302 03
Miscellaneous structures	15,250 41	19,793 01	35,043 42
Reconstruction of roads pur- chased	Cr. 10,859 85		Cr. 10,859 85
Equipment	4,641,390 06		4,641,390 06
	\$10,610,836 46	\$2,573,598 32	\$13,184,434 78
Add Principal of Equipment Trust obligations		1,000,000 00	1,000,000 00
Total	\$10,610,836 46	\$3,573,598 32	\$14,184,434 78

Advances for construction purposes were made as follows:—

Guyandot and Tug River Railroad	\$2,783 38
" " " " % Barker and Clarks Gap Railroad	136 00
" " " " % Clear Fork and Oceana Railroad	30 00
Big Stony Railway	151 134 94

Traffic.

As compared with the preceding year, the number of passengers carried increased 10,573, or 0.2 per cent.; the average haul of passengers increased 1.92 miles.

The total passenger revenue increased \$282,052.63, or 7.7 per cent.; the average rate per passenger per mile increased 0.041 cents.

Tons of freight carried increased 5,333,326 tons, or 26.8 per cent.; the average haul of freight decreased 3.66 miles.

The total freight revenue increased \$5,327,205.10, or 21.6 per cent.; the average rate per ton per mile decreased 0.013 cents.

The freight train mileage increased 1,853,025 miles, or 21.2 per cent.; the average tons per train mile increased 19 tons, or 3.1 per cent.

The coal shipments were 13,999,516 tons, an increase of 3,020,956 tons, or 27.5 per cent.

The lumber shipments were 1,674,981 tons, an increase of 151,463 tons, or 9.9 per cent.

The shipments of other low class commodities connected with the iron and steel industries were as follows:—

Coke shipments: 2,969,476 tons, an increase of 708,649 tons, or 31.3 per cent.

Ore shipments: 1,018,252 tons, an increase of 325,764 tons, or 47.0 per cent.

Pig and bloom iron shipments: 716,951 tons, an increase of 383,189 tons, or 114.8 per cent.

The following statement gives the passenger and freight statistics for the years 1910 and 1909:—

TRAFFIC AND MILEAGE STATISTICS.

FREIGHT TRAFFIC:—

	1909-1910.	1908-1909.	Increase or Decrease.	Per Cent
Tons of freight carried.....	25,412,529	20,049,203	I. 5,363,326	26.8
Tons carried one mile.....	6,722,495,887	5,377,020,950	I. 1,345,474,937	25.0
" " per mile of road.....	3,456,296	2,793,258	I. 663,038	23.7
Average distance carried per ton (miles).....	264.53	268.19	D. 3.66	1.4
Total revenue from freight.....	\$30,037,796 22	\$24,710,591 12	I. \$5,327,205 10	21.6
Average revenue per ton of freight (cents).....	118.20	123.25	D. 5.05	4.1
" " per mile (cents).....	0.447	0.460	D. 0.013	2.8
Total freight revenue, all sources.....	\$30,348,146 22	\$24,881,320 48	I. \$5,466,825 74	21.6
Freight revenue per mile of road.....	\$15,551 75	\$12,925 36	I. \$2,626 39	20.3
" " train mile (cents).....	285.94	285.16	I. 0.78	0.3

PASSENGER TRAFFIC:—

Passengers carried.....	4,930,108	4,919,535	I. 10,573	0.2
" " one mile.....	181,068,855	171,270,831	I. 9,798,024	5.7
" " per mile of road.....	93,095	88,972	I. 4,123	4.6
Average distance carried per passenger (miles).....	36.73	34.81	I. 1.92	5.5
Total revenue from passengers.....	\$3,924,889 67	\$3,642,837 04	I. \$282,052 63	7.7
Average revenue per passenger (cents).....	79.61	74.05	I. 5.56	7.5
Average revenue per passenger per mile (cents).....	2.168	2.127	I. 0.041	1.9
Total passenger revenue, all sources.....	\$4,815,724 20	\$4,445,781 18	I. \$369,943 02	8.3
Passenger revenue per mile of road.....	\$2,475 95	\$2,309 50	I. \$166 45	7.2
" " train mile (cents).....	119.88	118.12	I. 1.76	1.5

* Includes \$129,453 30, collected in the preceding year, as explained on pages 25 and 26 of the 13th Annual Report.

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TRAFFIC AND MILEAGE STATISTICS.	1909-1910.	1908-1909.	Increase or Decrease.	Per Cent.
TRAIN MILEAGE:—				
Revenue trains: freight.....	10,401,187	8,548,948	I. 1,852,239	21.7
" " passenger.....	3,839,804	3,587,179	I. 252,625	7.0
" " mixed.....	177,354	176,568	I. 786	0.4
" " special.....	6,136	4,872	I. 1,264	25.9
Non-revenue trains.....	775,896	475,845	I. 300,051	63.1
All trains.....	15,200,377	12,793,367	I. 2,407,010	18.8
LOCOMOTIVE MILEAGE:—				
Revenue trains: freight.....	15,139,357	12,401,584	I. 2,737,773	22.1
" " passenger.....	4,024,128	3,754,919	I. 269,209	7.2
" " mixed.....	191,574	184,092	I. 7,482	4.1
" " special.....	8,047	6,485	I. 1,562	24.1
Switching locomotives.....	2,916,956	2,492,618	I. 424,338	17.0
Non-revenue trains.....	809,157	536,632	I. 272,525	50.8
All locomotives.....	23,089,219	19,376,330	I. 3,712,889	19.2
CAR MILEAGE:—				
Mileage of loaded freight cars:				
North and East.....	110,918,298	98,750,697	I. 12,167,601	12.3
South and West.....	119,055,094	98,128,217	I. 20,926,877	21.3
Mileage of empty freight cars:				
North and East.....	75,552,999	60,460,159	I. 15,092,840	25.0
South and West.....	63,445,985	63,008,681	I. 437,304	0.7
Mileage of caboose cars:				
North and East.....	5,295,093	4,307,422	I. 987,671	22.9
South and West.....	5,152,489	4,237,093	I. 915,396	21.6
Average number freight cars per train mile excluding caboose...	34.88	36.14	D. 1.26	3.5
Average number loaded freight cars per train mile.....	21.74	21.99	D. .25	1.1
Average number empty freight cars per train mile excluding caboose.....	13.14	14.15	D. 1.01	7.1
Average number tons freight per train mile.....	635	616	I. 19	3.1
Average number tons freight per loaded car mile.....	29.23	28.02	I. 1.21	4.3
Mileage of passenger cars.....	21,391,488	19,709,897	I. 1,681,591	8.5
Average number passenger cars per train mile.....	5.33	5.24	I. .09	1.7
Average number of passengers per train mile.....	45	46	D. 1	2.2
Mileage of cars in special service	81,449	64,891	I. 16,558	25.5
Average mileage operated during year.....	1,945	1,925	I. 20	1.0

Summary of Passenger and Freight Car Mileage.

	Year ending June 30th.	
	1910.	1909.
Mileage of Norfolk and Western freight cars on Norfolk and Western Railway (including caboose).	230,488,253	228,816,345
Mileage of foreign freight cars on Norfolk and Western Railway	148,931,705	95,075,924
Percentage of freight car mileage made by foreign cars	39.25	29.35
Mileage of Norfolk and Western box cars on Norfolk and Western Railway	21,675,243	39,001,480
Average number of box cars in service on Norfolk and Western Railway	2,030	4,126
Average daily mileage of box cars on Norfolk and Western Railway	29.25	25.90
Mileage of Norfolk and Western coal cars on Norfolk and Western Railway	168,509,443	153,051,982
Average number of coal cars in service on Norfolk and Western Railway	14,035	15,288
Average daily mileage of coal cars on Norfolk and Western Railway	32.89	27.48
Total Norfolk and Western freight car mileage on Norfolk and Western Railway in transportation of freight	221,782,642	221,004,127
Average number of Norfolk and Western freight cars in service	34,406	34,006
Average number of Norfolk and Western freight cars in service on Norfolk and Western Railway	19,097	23,065
Average daily mileage on Norfolk and Western Railway	30.52	26.25
Total passenger car mileage on Norfolk and Western Railway	21,391,488	19,709,887
Mileage of Norfolk and Western passenger cars on Norfolk and Western Railway	16,114,735	15,059,154
Mileage of Norfolk and Western passenger cars on foreign lines	1,262,353	1,107,312
Total mileage made by Norfolk and Western passenger cars	17,377,088	16,166,476
Mileage of foreign passenger cars (including Pullman) on Norfolk and Western Railway	5,276,753	4,650,743
Percentage of passenger car mileage made by foreign cars	24.67	23.60

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It will be observed that under the order of the Interstate Commerce Commission the Company is required to show on its general balance sheet as a separate item under "Appropriated Surplus" the aggregate amount expended by it from its income for "Additions to Property since June 30th, 1907, through Income," viz., \$7,868,827.34, which includes the \$3,573,598.32 expended during the present year. It is the conviction of your Board that this amount like the aggregate credits to "Reserve for Accrued Depreciation" of equipment (see general balance sheet) should be deducted from Property Investment in Road and Equipment in order to show correctly the net capitalizable cost of road and equipment. Such disposition of this item, however, is not permitted under the order of the Interstate Commerce Commission now in force, which requires the amount to be set up as a separate liability account. It is, therefore, entered on both sides of the general balance sheet, being included in the property investment in "Road and Equipment" as an asset.

NORFOLK AND WESTERN RAILWAY COMPANY.

General Balance Sheet, June 30th, 1910.

ASSETS.

			Comparison with June 30th, 1909.
PROPERTY INVESTMENT:—			
Road and Equipment:—			
Investment to June 30, 1907:			
Road	\$151,440,746 22		
Equipment	24,383,021 25		
	\$175,823,767 47		
Investment since June 30, 1907:			
Road	\$15,978,992 78		I. \$8,542,118 42
Equipment	11,823,425 41		I. 4,641,380 06
General Expenditures	5,088 80		I. 926 30
	27,807,506 99	(See Note.)	
	\$203,631,274 46		
Reserve for Accrued Depreciation (of Equipment), Credit	8,132,589 53		I. 1,196,089 79
Securities:—		\$200,498,740 93	
Securities of Proprietary, Affiliated and Controlled Companies—Pledged. Stocks.		80,466 80	
Securities of Proprietary, Affiliated and Controlled Companies—Unpledged.			
Stocks	\$61,196 33		D. 1,836 67
Funded Debt	61,310 72		D. 2,477,802 84
Other Investments:—		122,509 05	
Advances to Proprietary, Affiliated and Controlled Companies for Construction, Equipment and Betterments:			
Blackstone and Lunenburg R. R. Co.			D. 51,184 06
Pocahontas and Western R. R. Co.			D. 413,823 44
Big Stony Railway Co.	\$65,187 98		I. 151,134 94
Guyandot and Tug River Railroad Co.	219,208 72		I. 2,949 38
		1,174,396 70	
Miscellaneous Investments:—			
Physical Property	\$338,107 45		I. 167,079 74
Securities—Unpledged	885,538 09		I. 59,772 50
		1,223,645 54	
WORKING ASSETS:			
Cash	\$9,198,550 22		I. 5,642,708 46
Securities issued or assumed—Held in Treasury	21,300 00		D. 4,976,800 00
Marketable Securities. Stocks	4,008 00		
Funded Debt	2,996,343 05		I. 2,831,933 06
Loans and Bills Receivable	4,500,612 74		I. 499,448 50
Traffic and Car Service Balances due from Other Companies	1,210,234 71		I. 267,742 54
Net Balance due from Agents and Con- ductors	771,322 60		I. 163,314 80
Miscellaneous Accounts Receivable	705,426 05		I. 78,497 14
Materials and Supplies	3,862,928 93		I. 1,286,017 18
Other Working Assets	388 46		D. 978 56
		23,271,114 76	
DEFERRED DEBIT ITEMS:			
Advances { Temporary Advances to Proprietary, Affiliated and Controlled Companies	\$1,377,456 47		I. 187,146 81
Working Funds	14,925 27		I. 396 31
Rents and Insurance paid in Advance	76,774 41		I. 18,967 80
Cash and Securities in Sinking and Redemptions Funds	11,984 23		D. 6,385,000 00
Other Deferred Debit Items	87,462 94		D. 17,789 80
		1,568,603 32	
		\$227,939,477 10	I. \$8,950,319 38

NOTE.—This sum includes the \$7,868,827.34 of "Appropriated Surplus" to which the note on the Liabilities side of the General Balance Sheet refers.

NORFOLK AND WESTERN RAILWAY COMPANY.

General Balance Sheet, June 30th, 1910.

LIABILITIES.

			Comparison with June 30th, 1909.
CAPITAL STOCK:—			
Adjustment Preferred	\$23,000,000 00		
Common	68,896,000 00	\$91,896,000 00	I. \$2,890,000 00
FUNDED DEBT:—			
Mortgage Bonds	\$83,283,500 00		
Plain Bonds, Debentures and Notes	22,673,000 00		I. 1,711,000 00
Equipment Trust Obligations	9,900,000 00	115,856,500 00	D. 2,000,000 00
WORKING LIABILITIES:—			
Traffic and Car Service Balances due to Other Companies	\$112,461 34		I. 45,555 44
Audited Vouchers and Wages Unpaid Vouchers	\$2,762,073 94		I. 1,479,410 07
Pay Rolls	1,336,216 89		I. 308,509 51
	4,098,290 83		
Miscellaneous Accounts Payable	190,906 43		D. 22,853 03
Matured Interest, Dividends and Rents Unpaid	531,263 68		I. 4,722 68
Matured Mortgage Bonded and Secured Debt Unpaid	7,000 00		I. 1,000 00
Other Working Liabilities	1,171 42	4,941,093 70	I. 1,171 42
ACCRUED LIABILITIES NOT DUE:—			
Unmatured Interest Dividends and Rents Payable	\$1,053,885 33		D. 248,427 00
Taxes accrued	538,794 78	1,592,680 11	I. 41,790 06
DEFERRED CREDIT ITEMS:—			
Operating Reserves			D. 833 34
Other Deferred Credit Items		209,863 31	I. 84,497 00
APPROPRIATED SURPLUS:—(See Note.)			
Additions to Property since June 30, 1907, through Income, Road	\$5,725,371 14		I. 2,573,598 32
Equipment	2,143,456 20	7,868,827 34	I. 1,000,000 00
PROFIT AND LOSS:—			
Credit Balance		5,574,532 64	I. 1,075,178 25
		\$227,939,477 10	I. \$8,950,319 38

NOTE.—This sum consists of expenditures since June 30, 1907, which in the judgment of the Board of Directors were required to offset obsolescence and depreciation due to changing conditions and were necessary to maintain the earning capacity and preserve the value of the Company's property and therefore should not be capitalized.

Table No. 3.
*Analysis of Earnings and Expenses of the Norfolk & Western Railway Company for the
 Year ending June 30th, 1910.*

	FREIGHT ACCOUNT.		PASSENGER ACCOUNT.		Total Amount.
	Amount.	Rate in Cents. Per Ton per Mile.	Amount.	Rate in Cents. Per Passenger per Mile.	
Earnings from freight	\$30,037,796 22	.447	\$3,924,889 67	2.168	\$30,037,796 22
" " passengers	" " " "	" " " "	" " " "	97.70	3,924,889 67
" " express	" " " "	" " " "	461,655 25	11.49	461,655 25
" " U. S. mail	" " " "	" " " "	338,449 10	8.43	338,449 10
" " miscellaneous sources	210,350 00	.003	90,730 18	.050	301,080 18
Total gross earnings	\$30,248,146 22	.450	\$4,815,724 20	2.860	\$35,063,870 42
Expenses (operating):—					
Maintenance of way and structures	\$2,998,235 04	.045	\$753,810 12	.416	\$3,752,045 16
" " equipment	5,261,454 44	.078	690,452 71	.381	5,951,907 15
Traffic expenses	420,910 17	.006	130,895 98	.072	551,806 15
Conducting transportation	8,438,980 74	.125	1,630,735 48	.901	10,069,726 22
General expenses	588,337 36	.009	132,937 65	.074	721,275 01
Total expenses	\$17,707,927 75	.263	\$3,336,831 94	1.844	\$21,046,759 69
Net earnings	\$12,540,218 47	.187	\$1,476,892 26	.816	\$14,017,110 73
Ratio of expenses to earnings	58.54 per cent.		69.33 per cent.		60.02 per cent.
Total mileage of revenue trains	10,578,541 miles.		4,017,158 miles.		" " " "
Total lading of revenue trains	25,412,529 tons.		4,930,108 passengers.		" " " "
Total freight and passenger mileage	6,722,495,887 tons one mile.		181,068,855 passengers one mile.		" " " "
Average haul of freight or passenger	264.53 miles per ton.		36.73 miles per passenger.		" " " "

Table No. 6.
General Summary of Freight Transportation on the Norfolk & Western Railway for the year
ending June 30th, 1910.

POINTS FROM AND TO.	Local or Through Business.	TOTALS.			Earnings per Ton per Mile. (Cents.)	Average Distance Carried.
		Tons Carried.	Tons One Mile.	Earnings.		
Local to local	Local	4,912,750	708,138,038	\$5,222,023 24	.737	144.1
Local to foreign	"	15,909,620	4,768,761,043	17,363,802 94	.364	299.7
Foreign to local	"	2,478,497	521,235,962	3,698,249 02	.710	210.3
Total local business		23,300,867	5,998,135,043	26,284,075 20	.438	257.4
Foreign to foreign	Through	2,111,662	724,360,844	3,753,721 02	.518	343.0
Grand total		25,412,529	6,722,495,887	30,037,796 22	.447	264.5

General Summary of Passenger Transportation on the Norfolk & Western Railway for the year
ending June 30th, 1910.

POINTS FROM AND TO.	Local or Through Business.	TOTALS.			Earnings per Passenger per Mile. (Cents.)	Average Distance Carried.
		Passengers Carried.	Passengers One Mile.	Earnings.		
Local to local	Local	4,582,974	132,766,365	2,951,428 66	2.223	29.0
Local to foreign	"	150,309	19,012,256	370,416 75	1.948	126.5
Foreign to local	"	147,735	19,338,609	387,970 54	2.006	130.9
Total local business		4,881,018	171,117,230	3,706,815 95	2.168	35.1
Foreign to foreign	Through	49,090	9,951,625	215,073 72	2.161	202.7
Grand total		4,930,108	181,068,855	3,924,889 67	2.168	36.7

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Table No. 7.

Classification of Freight carried on the Norfolk & Western Railway for the year ending June 30th, 1910, Compared with same period previous year (net tons).

CLASSES.	1909-1910.	1908-1909.	Inc. or Dec. in 1909-1910	
			Increase.	Decrease.
PRODUCTS OF AGRICULTURE.				
Grain	336,001	295,956	40,045	
Flour	155,569	160,015		4,446
Other mill products	85,617	99,895		14,278
Hay	124,453	133,059		8,606
Tobacco	120,477	97,345	23,132	
Cotton	31,550	43,283		11,733
Fruit and vegetables	173,221	123,478	49,743	
Peanuts	40,224	32,464	7,760	
Other products of agriculture	27,342	15,918	11,424	
PRODUCTS OF FORESTS.				
Lumber	1,674,981	1,523,518	151,463	
Cord wood	45,023	37,429	7,594	
Other products of forests	188,722	172,290	16,432	
PRODUCTS OF ANIMALS.				
Live stock	70,966	64,873	6,093	
Dressed meats	12,648	18,534		5,886
Other packing-house products	47,682	51,705		4,023
Poultry, game, and fish	13,381	3,990	9,391	
Wool	5,393	6,576		1,183
Hides and leather	39,321	36,056	3,265	
Other products of animals	6,758	5,541	1,217	
PRODUCTS OF MINES.				
Anthracite coal	13,462	21,789		8,327
Bituminous coal	13,986,064	10,956,771	3,029,283	
Coke	2,969,476	2,260,827	708,649	
Ores	1,018,252	692,488	325,764	
Stone, sand and other like articles	652,256	439,286	212,970	
Limestone	264,898	215,883	49,015	
Other products of mines	84,816	79,377	5,439	
MANUFACTURES.				
Petroleum, and other oils	48,603	48,348	255	
Sugar	99,139	104,314		5,175
Naval stores	9,201	349	8,852	
Iron—pig and bloom	716,951	333,762	383,189	
Iron and steel rails	54,374	51,199	3,175	
Other castings and machinery	203,156	194,709	8,447	
Bar and sheet metal	151,430	123,488	27,942	
Cement, brick and lime	489,614	429,441	60,173	
Fertilizer	120,401	119,416	985	
Agricultural implements	40,205	25,672	14,533	
Wagons, carriages, tools, etc.	21,133	13,396	7,737	
Wines, liquors, and beers	37,323	33,410	3,913	
Household goods and furniture	80,344	49,540	30,804	
Other manufactures	826,716	632,699	194,017	
Merchandise	198,948	170,079	28,869	
Miscellaneous: Other commodities not mentioned above	126,448	131,065		4,617
Total tonnage	25,412,529	20,049,203	5,431,600	68,274
Net inc. for year ending June 30th, 1910,			5,363,323	

(Here follow Defendant's Exhibits No. 7 and No. 8, marked pages 309-311.)

Defendants Exhibit J.W.C. #7.

Annual Report N.W. Ry Co. June 30th 1911.

Page 71 part of page 8.

GENERAL INCOME ACCOUNT

For the Year Ending June 30th, 1911, and Comparison with Previous Year.

	1911.	1910.	1910.	Increase or Decrease.
OPERATING REVENUES				
From freight	\$30,115,483 01		\$30,037,796 22	I. \$77,686 79
" passengers	4,184,246 01		3,924,889 67	I. 259,356 34
" mail	339,705 15		338,449 10	I. 1,256 05
" express	503,402 06		481,655 25	I. 41,746 81
" miscellaneous	414,686 24		301,080 18	I. 113,606 06
TOTAL OPERATING REVENUES	\$35,557,522 47		\$35,083,870 42	I. \$493,652 05
OPERATING EXPENSES.				
Maintenance of way and structures	\$4,328,717 35		\$3,752,045 16	I. \$576,672 19
Maintenance of equipment	6,638,841 52		5,951,907 15	I. 686,934 37
Traffic	586,715 55		551,906 15	I. 34,809 40
Transportation	10,672,624 23		10,089,726 22	I. 602,898 01
General	731,381 40		721,275 01	I. 10,106 39
TOTAL OPERATING EXPENSES		22,958,280 05	\$21,046,759 69	I. \$1,911,520 36
NET OPERATING REVENUE	\$12,599,242 42		\$14,017,110 73	D. \$1,417,868 31
TAXES		1,330,000 00	1,118,964 59	I. 201,035 41
OPERATING INCOME		\$11,279,242 42	\$12,898,146 14	D. \$1,618,903 72
To which add:—				
Interest, General Account,	\$394,343 23		\$534,121 23	D. \$139,778 00
Rents	49,678 81		57,146 85	D. 7,468 04
Hire of equipment	858,424 11		554,938 54	I. 303,485 57
		1,302,446 15	\$1,146,206 62	I. \$156,239 53
GROSS INCOME		\$12,581,688 57	\$14,044,352 76	D. \$1,462,664 19
From which deduct:—				
Interest on funded debt	\$4,435,200 00		\$4,179,530 00	I. \$255,670 00
Interest on Equipment Trust obligations	357,686 67		395,555 56	D. 37,868 89
Interest on 2-year Notes			206,154 37	D. 206,154 37
Rents of tracks, yards, etc.	6,660 34		122,237 96	D. 115,577 62
Miscellaneous	41,782 56		97,709 72	D. 55,927 16
		4,841,309 57	\$5,001,187 61	D. \$159,878 04
NET INCOME	\$7,740,379 00		\$9,043,165 15	D. \$1,302,786 15
Deduct expenditures to maintain earning power and offset obsolescence		2,597,108 57	3,573,598 32	D. 976,489 75
Balance	\$5,143,270 43		\$5,469,566 83	D. \$326,296 40

From this balance for the year ending June 30th, 1911 \$5,143,270 43

The following amounts have been deducted:—

Payments to Pocahontas Coal and Coke Company on account of deficiency of sinking fund and interest on Nor- folk and Western-Pocahontas Joint Bonds	\$148,000 00
Cash dividends on Capital Stock:	
Adjustment Preferred Stock, 4 per cent.	919,668 00
Common Stock, 5 per cent.	3,499,137 50
	4,566,805 50

Amount carried to Profit and Loss for the year \$576,464 93

Amount to credit of Profit and Loss, June 30th, 1910 5,574,532 64

Total \$6,150,997 57

Add premium on securities 3,200 00

Balance to credit of Profit and Loss, June 30th, 1911 \$6,154,197 57

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309a Following is a comparative table of average results for three years:

	1910-11.	1909-10.	1908-09.
Total Operating Revenues per mile of road.....	\$18,031	\$18,028	\$15,168
Net Operating Revenue per mile of road.....	6,389	7,207	5,957
Ratio of Expenses to Operating Revenues.....	64.57%	60.02%	60.72%
Ratio of Taxes to Operating Revenues	3.71%	3.19%	3.46%

Refundable Exhibit J. H. C. No. 8.

Annual Report, Norfolk and Western Railway Company, June 30th, 1912.

INCOME STATEMENT.
FOR THE YEAR ENDING JUNE 30th, 1912, AND COMPARISON WITH PRECEDING YEAR.

	1911-12	1910-11.	INCREASE OR DECREASE.	PER CENT.
RAILWAY OPERATING INCOME:				
Revenue from Transportation:				
Freight.....	\$34,022,572.20	\$30,115,463.01	Inc. \$3,907,009.19	12.97
Passenger.....	4,142,452.22	4,184,246.01	Inc. 138,206.31	3.28
Mail.....	343,253.93	319,705.15	Inc. 23,548.78	7.04
Express.....	\$30,117.89	\$03,402.06	Inc. 26,715.83	5.15
Miscellaneous.....	248,772.16	217,887.70	Inc. 30,884.46	14.17
Total Transportation revenue.....	\$39,487,368.50	\$35,960,723.93	Inc. \$4,126,644.57	11.07
Revenue from operation other than Transportation.....	247,668.55	196,798.54	Inc. 51,070.01	25.95
Total operating revenues.....	\$39,735,237.05	\$36,557,522.47	Inc. \$3,177,714.58	11.75
EXPENSES:				
Maintenance of Way and Structures.....	\$4,816,377.95	\$4,328,717.35	Inc. \$487,660.60	11.27
Maintenance of Equipment.....	7,676,464.10	6,648,841.52	Inc. 1,037,622.58	15.63
Traffic.....	639,935.74	536,715.51	Inc. 103,220.19	9.07
Transportation.....	11,371,799.60	10,672,624.23	Inc. 1,099,175.37	10.30
General.....	764,852.48	731,381.40	Inc. 33,471.08	6.58
Total operating expenses.....	\$25,669,429.87	\$22,958,280.05	Inc. \$2,711,149.82	11.81
Ratio of Expenses to Total Operating Revenues.....	64.60%	62.57%	Inc. .02%	
NET REVENUE—RAIL OPERATIONS:				
OUTSIDE OPERATIONS—Net deficit.....	\$14,065,807.18	\$12,599,242.42	Inc. \$1,466,564.76	11.64
	20,459.50	9,979.86	Inc. 10,479.64	104.51
NET RAILWAY OPERATING REVENUE	\$14,045,397.68	\$12,589,262.76	Inc. \$1,456,135.32	11.57
RAILWAY TAX ACCRUALS	1,410,000.00	1,320,000.00	Inc. 90,000.00	6.82
RAILWAY OPERATING INCOME	\$12,635,397.68	\$11,269,262.56	Inc. \$1,366,135.12	12.12
OTHER INCOME: —Hire of Equipment (balance).....	\$1,081,362.66	\$958,424.11	Inc. \$204,938.55	21.87
Dividend and interest income.....	260,784.29	394,343.23	Dec. 133,558.94	33.87
Miscellaneous income.....	10,094.81	49,680.81	Dec. 10,586.00	21.10
Total other income.....	\$1,362,241.76	\$1,302,448.15	Inc. \$59,793.61	4.67
GROSS INCOME	\$13,998,639.44	\$12,571,710.71	Inc. \$1,426,928.73	11.35
Deductions from Gross Income:				
Miscellaneous rent deductions (balance).....	\$39,125.17	\$6,666.34	Inc. \$32,664.83	355.31
Separately operated properties.....	108,052.86	149,213.15	Dec. 61,160.29	36.14
Interest deductions for Funded Debt:				
Mortgage bonds.....	3,622,340.00	3,622,480.00	Dec. 100.00	
Convertible bonds.....	485,080.00	512,720.00	Dec. 327,640.00	40.51
Equipment Obligations.....	276,377.00	357,666.67	Dec. 81,289.67	22.73
Miscellaneous deductions.....	94,750.00	45,584.25	Inc. 49,165.65	107.86
Total Deductions.....	\$4,618,945.03	\$5,014,326.51	Dec. \$397,159.48	7.92
NET INCOME	\$9,381,674.41	\$7,557,384.20	Inc. \$1,824,290.21	27.48
Dividends on Adjustment Preferred Stock.....	919,668.00	919,668.00		
INCOME BALANCE: —Transferred to Profit and Loss.....	\$8,462,006.41	\$6,637,716.20	Inc. \$1,824,290.21	27.48

The Income and Profit and Loss statements conform to the arrangement prescribed in the order of the Interstate Commerce Commission taking effect July 1st, 1912. The figures of the previous year have been rearranged to facilitate comparison.

PROFIT AND LOSS STATEMENT.

	1911-12	1910-11	INCREASE OR DECREASE	Per Cent.
<i>Credits</i>				
Balance July 1st.....	\$6,154,197.57	\$5,574,532.64	Inc.	\$579,664.93 10.40
Credit Balance from Income Account for the Year.....	8,462,006.41	6,637,718.29	Inc.	1,824,288.21 27.48
Premiums on Securities sold.....	.....	1,700.00	Dec.	1,700.00 00.00
Miscellaneous Credits.....	6,471.13	25,168.47	Dec.	28,639.34 81.60
Total credits.....	\$14,622,675.11	\$12,230,019.31	Inc.	\$2,392,655.80
<i>Charges</i>				
Dividends on Common stock.....	4,668,437.50	3,499,137.50	Inc.	1,169,300.00 33.42
Appropriations of Surplus for Additions and Betterments.....	1,372,065.07	2,597,108.57	Dec.	1,225,043.50 47.17
Miscellaneous Debits.....	1,340.55	175.67	Inc.	1,164.88 663.11
Total charges.....	\$6,041,843.12	\$6,096,421.74	Dec.	\$54,578.62
Credit balance June 30th.....	\$8,580,831.99	\$6,134,197.57	Inc.	\$2,446,634.42

The Dividends were as follows:—

Adjustment Preferred Stock:—

No. 35 Payable November 18, 1911, 1	per cent. on \$22,991,700 =	\$229,917.00
No. 34 Payable February 19, 1912, 1	per cent. on 22,991,700 =	229,917.00
No. 33 Payable May 18, 1912, 1	per cent. on 22,991,700 =	229,917.00
No. 36 Payable August 19, 1912, 1	per cent. on 22,991,700 =	229,917.00

Common Stock:—

	4 per cent	\$919,648.00
No. 25 Payable September 18, 1911, 1½	per cent. on \$74,429,000 =	\$919,648.00
No. 26 Payable December 18, 1911, 1½	per cent. on 80,145,000 =	1,202,175.00
No. 27 Payable March 18, 1912, 1½	per cent. on 81,820,000 =	1,227,300.00
No. 28 Payable June 19, 1912, 1½	per cent. on 85,240,000 =	1,278,600.00
	5½ per cent	\$4,668,437.50

It will be noted that the gross operating revenues show a substantial increase. The liberal expenditures which have been made for improvements upon your lines and for heavy engines and freight cars of large capacity have enabled your management to show a practically unchanged ratio of operating expenses to operating revenues, notwithstanding substantial increases in rates of employees' wages. The taxes for the year again show an increase.

The increase in the amount of dividends on Common Stock is due in part to the increase in dividend rate from 5 per cent. to 6 per cent. and in part to the issue of additional shares in exchange for Convertible Bonds surrendered.

Comparison of traffic and revenue figures with those of the previous year shows the following interesting changes:

Number of passengers.....	increased	331,800	0.81 per cent.
Average haul of passengers.....	decreased	0.77 miles	2.85 "
Revenue from passenger fares.....	increased	\$138,306.31	1.78 "
Average rate per passenger per mile.....	decreased	0.618 cents	0.83 "
Revenue freight earned.....	increased	3,507,316 tons	13.58 "
Average haul of freight.....	increased	10.56 miles	4.01 "
Revenue from freight transportation.....	increased	\$3,907,080.19	12.97 "
Average rate per ton per mile.....	decreased	.019 cents	4.28 "
Average tons of revenue freight per train mile.....	increased	49.82 tons	7.75 "
Shipments of coal.....	increased	4,162,929 tons	28.14 "
Shipments of lumber.....	decreased	59,794 tons	3.85 "
Shipments of coke.....	decreased	392,667 tons	30.13 "
Shipments of ore.....	decreased	108,090 tons	22.52 "
Shipments of pig and iron bloom.....	increased	62,275 tons	10.71 "

311

312 In the Circuit Court of Kanawha County, State of West Va.
In Equity.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
WM. G. CONLEY, Attorney General of the State of West Virginia,
et al., Defendants.

Depositions of C. W. Hillman, and others, taken before me, John C. Bond, a Notary Public in and for the County of Kanawha and State of West Virginia, pursuant to agreement between John H. Holt, counsel for the Norfolk & Western Railway Company and William G. Conley, Attorney General, and counsel for defendants, at the office of the Attorney General, at the State House, in the City of Charleston, said County and State, on Monday, the 4th day of March, 1912, between the hours of 9 o'clock, A. M. and 6 o'clock, P. M., to be read as evidence on behalf of the defendants in a certain suit in equity pending in the Circuit Court of Kanawha County, in said State, wherein the Norfolk & Western Railway Company is plaintiff, and Wm. G. Conley, Attorney General for the said State of West Virginia, and others, are defendants:

Present:

Lucian H. Cocke, Esq., and Hon. John H. Holt, Attorneys for Plaintiff.

Wm. G. Conley, Attorney General, for Defendants.

313 Whereupon came C. W. HILLMAN, a witness of lawful age, who being by me first duly sworn, deposes and says as follows:

Direct examination by WM. G. CONLEY:

Q. 1. Give your name, age, residence and business.

A. C. W. Hillman; age, 55; residence, Evanston, Illinois; place of business, Louisville, Kentucky; business, public accountant, as President of The Mutual Audit Company.

Q. 2. How long have you been a public accountant?

A. I have been a public accountant for the last six years.

Q. 3. What experience have you had as a railroad official or in the railroad business in any capacity?

A. I graduated from the Lafayette College, at Easton, Pennsylvania, in 1874 as civil engineer. I did some work on the civil engineering corps for the Cumberland Railroad Company and the Quincy, Alton & St. Louis Railroad Company, which is now a part of the Burlington System. I then entered the employ of the Cumberland Valley Railroad Company as telegraph operator, and served them in various capacities as telegraph agent, agent, scales clerk, car accountant, superintendent's clerk, conductor on passenger trains, conductor on freight trains, the latter two employments being preparatory to my appointment as assistant dispatcher of the Cum-

berland Valley Railroad Company. I was then made dispatcher of the Cumberland Valley Railroad Company. I left the employ of this company in 1880 and entered the employ of the Northern Pacific Railroad Company, in its office in New York City, as their stock and bond clerk. I served all through this office, and in 1887 I was elected assistant treasurer of the Northern Pacific Railroad Company with offices in the City of New York. I then was transferred by them to Chicago, they having leased the Wisconsin Central Lines, the Chicago terminals, which were operated under the title of the Chicago & Northern Pacific Railroad. They having transferred their offices of the then Northern Pacific Express Company to that city, these were under my charge as assistant treasurer, but the treasurer at this time was practically comptroller of the road, and the entire financial management fell into the hands of the assistant treasurer at New York, the assistant treasurer at Chicago and the assistant treasurer at St. Paul, I being one of the three. I left the Northern Pacific Railroad Company in 1895, owing to the receivership and the reorganization of the road and the loss of their Chicago terminals. I entered the employ of the Chicago, Rock Island & Pacific road, first, as a general utility man in the comptroller's office, Mr. J. L. Cramer, and afterwards in charge of the insurance matters of the company, they having an insurance department. The insurance department was then split from the comptroller's office and I was made chief clerk of that department. I left them after a year's service and established myself, after considerable inconvenience, I would call it, as a consulting accountant for the Baker-Vawter Company, who are manufacturers to a large extent, but maintain a large and growing audit department. After a year and a half's service I left them and entered the service of the Indiana Audit Company in charge of their cost department. Shortly after entering their service I found that this company was bankrupt (as they are out of business there is no harm in making this statement in the record), and I then established my own company, the present one, The Mutual Audit Company. At this time we obtained the contract for doing the railroad work for the State of Kentucky, in their contest with the railway companies, in regard to both passenger and freight rates. I have served in this capacity as public accountant in railway matters and also in express matters, the States of Kentucky, North Carolina, Florida, Alabama, Arkansas, Indiana, Illinois, South Dakota, Minnesota, and Ohio, the latter being in the employment, not directly of the State, but of the coal shippers, in the Wheeling & Lake Erie, No. 8 District, the work, however, being directed to be done by the Railroad Commission of the State of Ohio. I served in other cases for the shippers, notably the Norfolk & Western Railway Company, in their Lake Coal rates, for the Hocking Valley Railway Company, in the same rates, and again the shippers in the Wheeling & Lake Erie case, that is, No. 8 District of Ohio, same rates. In some of these states the employment was two or three different times.

Q. 4. Mr. Hillman, you may state whether you have examined

the books of the Norfolk & Western Railway Company, in connection with the litigation instituted by that company against the Attorney General of West Virginia, and others, wherein they seek to have declared null and void the 2-cent passenger act of the Legislature of West Virginia?

A. Yes, sir; I have made an investigation of the books and records of the Norfolk & Western Railway Company in order to testify in that case.

Q. 5. You may state, if you will, the examination made?

A. In making this analysis we have used the Pocahontas and Kenova divisions of the Norfolk & Western road as typical of the entire state passenger traffic, ignoring the small mileage of the Radford division and the Shenandoah division, which are in the State, I believe, about 19 miles of the Radford division, and if my recollection serves me, some 13 miles of the Shenandoah division. The inclusion of these two divisions would to my mind make but little difference in the practical result as to the sufficiency or insufficiency of this rate. I had perhaps better state right here the reasons for

the selection of these two divisions. The division of freight and passenger upon the Pocahontas and Kenova divisions had already been made by me for the purpose of the Lake Coal rates, and as the appropriation of West Virginia was limited, they did not desire to go into any more expense than was absolutely necessary for the proper determination of this question. I have used the freight and passenger on these operating divisions as determined by me in the Norfolk & Western lake coal rate cases, as necessarily my divisions would show the same for this passenger purpose as well as for the freight purpose in either case, and on account of the expense entailed, I did not go into a similar division on the Shenandoah and the Radford divisions.

Q. 6. Which contain how many miles?

A. Which contain about 39.90 miles of the total mileage in West Virginia. My recollection is it is about $7\frac{1}{2}$ or 8 per cent of the total track mileage in West Virginia. I would say that the Norfolk & Western Railway Company keep on their books a division of expenses between freight and passenger. Their method is to locate directly to freight or passenger such of these expenses as can be directly assigned to either branch of the service, and in the memorandum of the analysis which I have made, and in my testimony, I shall refer to this direct assignment of expenses by using the word "allocation." The dictionary definition is slightly different from that, but that is the general accepted use of the term now—that an allocation is a direct location of the expenses.

The remainder of the expenses such as are common to both freight and passenger have been divided by the Norfolk & Western Railway Company upon an arbitrary basis of 20 per cent to the passenger business. This 20 percent is supposed to represent the relation of the passenger engine mileage to the freight engine mileage, and does not take into account the switching engine mileage. Besides its arbitrary character as a general factor for the division of all expenses, it is open to the serious objection that it does not represent

the true relation of the passenger engine mileage to the freight engine mileage for the operating divisions under consideration, nor for the year under consideration, it having been determined for the entire Norfolk & Western system and for some year previous to the one in question, and no correction being made for any variation during the current year in this percentage as between freight and passenger. We have shown the book division of the Norfolk & Western Railway Company for the Pocahontas and Kenova divisions for the months of November, 1909, and May, 1910, both months within the fiscal year in question, ending June 30, 1910, and also the entire freight and passenger divisions as shown by the books of the company for the fiscal year ending June 30, 1910 upon an exhibit.

319 Q. 7. Mr. Hillman, will you file as a part of your deposition the operation expenses of the Pocahontas and Kenova divisions for the months of November, 1909, and May, 1910, for the fiscal year ending June 30, 1910, as reported in the books of the Norfolk & Western Railway Company, and mark the same "C. W. Hillman—Exhibit No. 1?"

Mr. COCKE: We object to the foregoing question on the ground that it is irrelevant to the issues made in the bill filed in this case.

A. Yes, sir; I so file them.

Q. 8. Mr. Hillman, will you also file as a part of your deposition a statement showing the operating expenses, Pocahontas and Kenova divisions, for the months of May, 1910 and November, 1909, divided into freight and passenger, on the Mutual Audit Company's basis, and mark the same "C. W. Hillman—Exhibit No. 2?"

Mr. COCKE: We object to the foregoing question on the ground that it is irrelevant to the issues made in the bill filed in this case.

A. Yes, sir, I so file.

Q. 9. Why do you select the month of November, 1909, and the month of May, 1910, as a basis for making up your Exhibits Nos. 1 and 2?

A. They were chosen in the case to which I referred, that is the Lake Coal rate case, as months typical of the business for the
320 year in those two months; and I consider them also as typical of the passenger business, that is the results of the passenger business as analyzed for these two months with practically the passenger business as analyzed for the year.

Q. 10. You mean the fiscal year of the railway company?

A. Yes, sir, the fiscal year of the railway company ending June 30, 1910.

Q. 11. Please quote the total figures as shown by you and those shown by the Norfolk and Western's method of division, giving a detailed statement.

A. On the Pocahontas division, for the month of November, 1909, the railway company shows freight expenses of \$251,118.53; passenger expenses, \$48,895.22. The division made by me shows \$261,065.34 as the freight expenses, and \$37,100.72 as the passenger

expenses. On the Pocahontas division for the month of May, 1910, the railway company shows freight, \$295,530.50; passenger, \$51,885.72. I show for the same division and the same month on Exhibit No. 2, freight expenses, \$289,713.86; passenger expenses, \$40,643.36. On the Kenova division for the month of November, 1909, the railway company's books show, as per Exhibit No. 1, freight expenses, \$189,565.38; passenger expenses, \$31,137.37. I show, as per Exhibit No. 2, same division and same month, freight expenses, \$202,117.35; passenger expenses, \$23,989.82. For the month 321 of May, 1910, the books of the railway company show, as per Exhibit No. 1, freight expenses, \$212,467.83; passenger, \$36,690.75; while for the same division and the same month I show, as per Exhibit No. 2, freight expenses, \$204,907.14; passenger expenses, \$25,557.84.

Q. 12. Mr. Hillman, please give the details in making up the Exhibit.

A. If you will note, the first column upon Exhibit No. 2 is marked "total as adjusted." The expenses as noted in Exhibit No. 1 are the expenditures during the month or the amounts of labor and material which were expended during the months of May, 1910, and November, 1909. In my maintenance of way and structures account, I have taken instead of the amounts which were expended during those two months, one-twelfth of the year's expenses, as representing the proper amount which should be charged to the traffic of those two months, for the reason that the expenditures made in any one month do not necessarily show the amount of expense which was incurred in that month; in fact they show an entirely different result, especially in maintenance of way and structures accounts, for the reason that the damage which has to be replaced during that month evidently did not occur during that month, but at some time prior to that month, and was simply replaced in that month; and for that reason I have taken the one-twelfth of the yearly 322 expenses as representing the proper amount to be charged during each of these months. This answers Mr. Cocke's side question as to the fact that the totals of the expenses as shown by me for these two months are not the same as those shown by the railway company for the two months.

In the second block of expenses—the maintenance of equipment expenses—these expenses have been assigned to different months on the basis of the respective mileages made by each class of equipment, such as cars, engines, or whatever they are for that month, and taken over in that way, and not on the one-twelfth basis; and, therefore, they have been adjusted as you will note the column is adjusted. They have been adjusted on that basis for the reason, as can be readily seen, that the repairs of cars made in any one month, and the expense attached thereto, are not necessarily to replace the wear made during that month but wear which has occurred previous to that time.

The first general account is Maintenance of Way and Structures. Under this first general account, the first item, No. 1—Superintendent

ence. This has been divided between freight and passenger upon the basis of accounts Nos. 2 to 16 inclusive, on the ground that the activities of the superintendent would be represented by the amount of work which he superintended, and the amount of work which he superintended is shown by Nos. 2 to 16 inclusive.

Accounts Nos. 18, 19 and 20 have been divided upon the same percentage as superintendence and for the same reasons.

323 Primary Account No. 2—Ballast—has been divided between freight and passenger upon the following basis: 10 per cent of the ballast has been considered as a wear proposition, as worn out by the passage of the traffic over it, and that has been divided between freight and passenger upon the basis of the weights of the respective freight traffic and passenger traffic passing over the tracks. Included in this is the switching, which has been taken upon the basis of 95 per cent freight and 5 per cent passenger. This gives a percentage of 93.153 per cent as the freight percentage of the weight passing over the tracks. The other 90 per cent of the ballast has been considered as a weather proposition, and not dependent upon the amount of traffic which passes over the track, but upon the weather conditions, and this has been divided between freight and passenger upon the basis of the gross earnings, which assigns 86.085 per cent to the freight traffic and the balance to the passenger traffic. I would state that the reasons for this division, or rather for the use of the weights in the division of the wear portion of this expense, is the inequality in the train mileage basis when it is considered as a factor, which basis is frequently used as a division between freight and passenger, and also the inequality of the engine mile basis, for the reason that it does not represent the total wear over the track. An engine mile or a train

324 mile pulling or representing a light train would be, if this method were used, on a parity with an engine mile or a train mile pulling a much heavier weight. There is no distinction made between the different classes of trains. The wear, therefore, has been taken by me upon the basis of the weights passing over the track, and in doing so I have considered that the speed of a passenger train is compensated for by the equipment of the freight train being of an inferior character and not being adjusted to the nicety of meeting the requirements of the track which the passenger train is. There are a number of considerations which enter into this, such as the larger amount of flat wheels which are on freight trains as compared with passenger trains. A flat wheel on a passenger train is removed immediately, or at the first end of a run; it is not allowed to go on, while the freight car will frequently make a number of trips, or the car be used off and on regardless of the flatness of its wheel, so that there is more destruction or wear to the track on this account than there is on the other. I recognize that in offsetting one of these against the other that I am offsetting two unknown factors. I am offsetting the effect of the speed on the track, which is unknown, against the effect of the inadequacy of the freight equipment and its inequitable loading, as you will frequently notice in looking over freight trains that one leans to the

325 right and the other leans to the left. The balance of these expenses which are due to the weather are replaceable from the gross earnings before the net earnings can be determined; for that reason there has been an assignment made by me of this portion of the expenses upon the basis of the gross earnings. This part of the expenses has no relevancy, you might say, to the amount of traffic which passes over it; it is independent of it, and the only method of replacement is from the gross earnings, and from my point of view each traffic should stand its amount as expressed in its gross earnings. The percentage of 10 per cent and 90 per cent used here is derived from the Wisconsin Railway Company's decision, in *Buell v. The Chicago, Milwaukee & St. Paul Railroad Company*, where the entire amount of roadway and track expense, outside of rails and ties and other track material, was divided by them on the basis of 10 and 90. At this time these were all included under one operating heading.

The next primary account is No. 3—Ties: 17½ per cent has been considered as due to wear and divided upon the weight basis; 82½ per cent has been considered as due to the weather and divided upon the earnings basis. The reason for the selection of this percentage is that originally in the *Buell* case which I had started to examine critically the percentage used was 25, and after considerable consultation on this point with the Commission at Madison, Wisconsin—Wisconsin Commission, I adopted 17½
326 per cent as representing the amount due to wear and that the balance was due to the weather. If you will refer to *Gillette's Handbook of Railway Cost*, page 1260—

By Mr. COCKE: We object to this business of stating results of conversations with the Wisconsin Commission or any member thereof.

By Mr. CONLEY: Go on with your statement.

Mr. HILLMAN (continuing)—you will note there that under an 80 to 90-pound rail it is stated that the percentage of wear on ties is about 5 per cent; under a 60-pound rail it runs 40 per cent. This is a railway engineer's handbook and is no doubt in possession of the Norfolk & Western people, or available to them, and could be referred to.

Primary Account No. 4—Rails: I have taken 90 per cent of the wear of the rails as due directly to the traffic passing over it, and the other 10 per cent due to the weather. In the *Buell* case this was taken as 100 per cent due to wear and no allowance made for the weather or the rusting of the rails. In the case of the Alabama 2-Cent Rate Case, the engineer of the Louisville & Nashville road assumed the same proportions as I have in this case. That is a case which is on record and testified to, and in which I testified, and I am cognizant of the facts and the testimony.

327 Objected to by counsel for Plaintiff.

Primary Account No. 5—Other Track Material: It is divided upon the same basis as the preceding account No. 4, for the reason that "Other Track Material" in its wear is coincident with the rails.

Primary Account No. 6—Roadway and Track. The percentage of wear and weather in this account is this: Roadway and track is a composite account, and the work done under it represents more or less the following accounts: Nos. 2, 3, 4, 5 and 11. We find that the percentage of wear as against weather in these five accounts which I have mentioned is 48.8606 percent. We are, therefore, taking that 48.8606 percent of this Roadway and Track account was due to the replacement of the wear conditions and the other percentage as due to the replacement of the weather conditions, the first percentage being divided upon the weights and the second percentage upon the earnings basis.

Primary Account No. 8—Tunnels: This has been divided between freight and passenger upon the revenue per mile basis. The tunnels are not touched by the wear of the trains going through them, and are not particularly affected by the weather; and we, therefore, consider that their expenses are to facilitate a train movement, as a train movement, and for no other purpose; and we, therefore, divide them between freight and passenger upon the basis of the revenue
 328 train miles; and as these tunnels are not within the switching limits of any other, the switching mileage is excluded from this computation. This gives 75.581 percent to freight and the balance to passenger.

Primary Account No. 9—Bridges, Trestles and Culverts: 15 percent of this is considered as wear and the other 85 percent as due to weather conditions, divided respectively upon the weights and the earnings.

Primary Account No. 10.—Over and Undergrade Crossings: Repairs to these over and undergrade crossings do not represent the features of the wear and the weather, but they are there in their entirety for the facilitating of the train movement as such, and they are, therefore, divided upon the train miles, including switching, as these grade crossings, over and underhead, are included in switching limits as well as outside on the main line track.

Primary Account No. 11—Grade Crossings, Fences, Cattle Guards and Signs: I have taken that 25 percent of these Grade Crossings, Fences, Cattle Guards and Signs is due to the wear and that 75 percent is due to the weather, the first being divided upon the weight basis and the second—the 75 percent—upon the earnings basis. The reason for the adoption of the higher percentage on grade crossings, cattle guards and signs is the fact that in rolling over the grade
 329 crossings the tread of the wheels and the flange of the wheels play havoc with the wooden planks which are used in the formation of these grade crossings, and they wear out according to the weight passing over them; this is represented by the tonnage.

Primary Account No. 13—Signals and Interlocking Plants: This has been divided upon the basis of train miles, including switching, which assigns 78.834 percent to the freight traffic and the balance to passenger. The reason for this is obvious, as the signals and interlockers guard both the main line movement and switching

movement, and regarded on the basis of a train, regardless of the length of a train.

Primary Account No. 14—Telegraph and Telephone Lines: This has been divided upon the basis of 20 per cent passenger, the figures being taken by me from a statement made to me by the Superintendent of Telegraph of the Toledo Division of the Pennsylvania road, wherein he stated that 1/5th of his messages were due to passenger and 4/5ths were due to freight.

Exception by counsel for Plaintiff.

This is the only data that I have bearing directly upon this subject. I adopted it in this case. It has been my custom heretofore to take that on the basis of one-half car miles and one-half train miles, car miles being what I consider the static relation between freight and passenger traffic and the train miles representing the movement of freight and passenger.

330 Primary Account No. 16—Buildings, Fixtures and Grounds: I have taken that 70.66 per cent of this was due to freight and the balance 29.34 per cent was due to passenger. I have taken the tax report made by the Norfolk & Western road to the State of West Virginia for the year 1910, and have gone over roughly, but still I consider with approximate accuracy, the valuations of those buildings—those that are directly assigned to the freight and passenger service and those that are assigned to engine houses, shops, right of way buildings, water stations, fuel stations, and those that are general in their character; and I made the division of those in the freight and passenger service upon the basis of those buildings which could be directly assigned to freight and to passenger. I have taken the shops upon the general basis of maintenance of equipment accounts; I have taken the roadway buildings upon the basis of way and structures; I have taken the general office buildings upon the general percentage of all of these accounts as I have set them out, and have taken the water and fuel stations upon the basis shown in water and fuel accounts, as expressed in these exhibits; and the total result is 29.34 per cent of the buildings is a passenger item.

Primary Account No. 18—Roadway Tools and Supplies; Primary Account No. 19—Injuries to Persons; Primary Account No. 331 20—Stationery and Printing: These have been divided on the same basis as Account No. 1—Superintendence, and for the same reasons, their use being occasioned by the preceding accounts Nos. 2 to 16 inclusive.

This concludes the division between freight and passenger of the first block of accounts—Maintenance of Way and Structures.

The second block of accounts—Maintenance of Equipment.

Primary Account No. 24—Superintendence: I divided this on the basis of Accounts Nos. 25 to 45 inclusive, for the reasons that I have given with regard to superintendence above. This gives 88.0964 percent freight, the balance being passenger.

Primary Account No. 25—Steam Locomotive—Repairs: This has been divided between freight and passenger by the Norfolk & Western road; they have, however, included in their freight engine repairs

the switching engine movement. We have taken out from their total engine repairs the mileage proportion of switching as against the total and then charged 5 per cent of that to the passenger traffic, leaving the balance as freight. We then found that on account of company material carried on freight trains, a portion of which is passenger material, that is the fuel for locomotives and the
332 amount of material used in both repairs to passenger cars and in other passenger service, that a further deduction of .415 per cent should be made from the freight engine repairs and charged to passenger because the freight engines while engaged in this service of hauling are aiding the passenger traffic to that extent. We have taken that percentage of the freight, not including the switching movement, and charged that to passenger in addition to its proportion of the passenger expense. The small amount of material which is carried on passenger trains for emergency in freight items can be disregarded, and also there can be disregarded any credit to passenger on account of the movement of the men passing backward and forward to their various duties. Those items I considered too small to go into. I had at one time in prior analyses considered this matter of company material on freight trains as too small to go into, but I found it assume a proportion which was not negligible when I went into it to determine it definitely.

There are no charges to Primary Account No. 26—Steam Locomotive—Renewals—on this division.

Primary Account No. 27—Steam Locomotive—Depreciation: There has been 89 per cent charged to freight and the balance to passenger traffic. This figure is taken from the valuation given in the Norfolk & Western's report to the State of West Virginia for 1911, and I herewith file Sheet No. 18 of that report as a part of my
333 deposition, marked "C. W. Hillman—Exhibit No. 8", and the percentage can be verified from that.

Primary Accounts Nos. 31, 32 and 33, referring entirely to passenger train cars, are considered in total a passenger item.

Primary Accounts Nos. 34, 35 and 36, being freight train car repairs, are taken as a freight item, with the exception of allowing .415 percent to the passenger business on account of the passenger proportion of company material carried on freight trains.

Primary Account No. 40—Floating Equipment—Repairs: This is taken entirely as a freight item.

Primary Accounts Nos. 43, 44 and 45, being Work Equipment—Repairs, Renewals and Depreciation, are taken on the basis of Accounts Nos. 2 to 15 inclusive, under Maintenance of Way and Structures Account, the principal use of this Work Equipment being in these accounts, from 2 to 15 inclusive. I have left out of the computation of this account—the Repairs to the Wrecking Equipment, and also the slight use of this Work Equipment and also with reference to Buildings, Fixtures and Grounds.

Primary Account No. 46—Shop Machinery and Tools: This has been taken on the basis of Accounts Nos. 25 to 45, inclusive, the Shop Machinery and Tools being used in the activities represented by these accounts Nos. 25 to 45, inclusive.

334 Primary Account No. 48—Injuries to Persons—has been taken on the same basis and for the same reasons that the activities which might or might not result in injury have been expressed in the preceding accounts.

Primary Account No. 49—Stationery and Printing—has been taken upon the same basis and on the same supposition that this is the use of the material to which the stationery and the printing has been put.

This completes the division of the second block of accounts—Maintenance of Equipment—between freight and passenger, Pocahontas Division, May, 1910, and is shown upon Exhibit No. 2.

Q. 13. I note on Exhibit No. 2, on which you are now testifying under Division 1—Maintenance of Way and Structures—you have left out item No. 12. Please explain why this was done.

A. These accounts, as I stated, were taken practically bodily from the Norfolk & Western Lake Coal Rate cases; this account was not considered for the reason that during the months when the lake coal moves this expense of removing snow, sand and ice was not incurred and had no place in the expenses which we were then treating. On Exhibit No. 6, however, I have taken up these amounts which should be properly charged into this computation of expenses and added them to the expenses as shown by my Exhibits
335 2, 3 and 4; and, therefore, while omitted on this exhibit, they are not omitted from the final computation.

Q. 14. Mr. Hillman, you may now proceed with your detailed explanation of Division No. 3—Traffic Expenses.

A. In "Traffic Expenses" all of the accounts in this block, with the exception of Primary Account No. 58—Industrial and immigration Bureaus—have been allocated by the Norfolk & Western Railway Company and their allocation accepted. In Primary Account No. 58—Industrial and Immigration Bureaus—the engine mile factor of 20 percent had been used, and in this case I divided that upon the earnings basis instead of the engine miles basis, as I considered that in this respect the earnings would have more direct relation to these expenses than would the engine miles; thus assigning 86.085 percent of this account to freight in lieu of the 80 percent assigned to freight on the Norfolk & Western's books.

This completes the division of the third block of expenses—Traffic Expenses—between freight and passenger, with the results shown on my Exhibit No. 2.

The next block of expenses is the Transportation Expenses:

Primary Account No. 61—Superintendence—is divided upon the basis of all accounts in this block of expenses, with the exception of the so-called joint accounts, that is, operation of joint tracks,
336 yards and terminals. It so happens that on this division there are no joint tracks, yards and terminals; on other divisions there are, and where these accounts do occur they have been omitted from the figures which produce the percentage upon which "Superintendence" has been divided, for the very obvious reason that the expenses of these joint tracks, yards and terminals come to the superintendent—bills from other companies, and he is not active in the supervision of these expenses as they are incurred; he is active,

however, to a slight extent in checking them up after he receives them, but it is that clerical labor spent which in the credit accounts of the joint tracks, yards and terminals he has already supervised these accounts, which are culled from the accounts over which he has active supervision; and we should not, therefore, make a deduction in his percentage or any addition to his percentage due to the second supervision of these primary accounts; and for that reason they were omitted when we produced these percentages.

Accounts Nos. 97 and 98 being also divided on the same percentage as Account No. 61, would not enter into it; but, of course, being on the same percentage, if they did enter into it, they would not alter the percentage.

Primary Account No. 62—Dispatching Trains—has been divided between freight and passenger on the basis of the revenue
337 train miles, which assigns 75.581 percent to freight, the balance to passenger. The reason for this is obvious, as the dispatcher's business is to a large extent to see that his trains move over the road, and they move over the road on the basis of trains, not regarding the size of the trains. There is omitted in this whatever duties are assigned to the dispatcher in the distribution of cars to meet traffic. In this case I would consider that this part of his duties would throw a heavier expense on freight, as far as that portion goes, if it is considered, than it would upon passenger; and, therefore, in making this division between freight and passenger upon the revenue train mile basis, I considered it practically accurate, and if any error has been made, it is in charging slightly too much to the passenger expenses.

Primary Account No. 63—Station Employés: The Railway Company has allocated \$1,771.76 to passenger, and \$10,331.61 to freight, leaving only \$216.41 as a common item, which common item has been divided upon the basis of the allocations between freight and passenger; it assigns 85.3614 percent to the freight service and the balance to passenger.

Primary Account No. 64—Weighing and Car Service Associations: This is all freight, and so charged.

Primary Account No. 66—Station Supplies and Expenses: \$42.80
338 of this account is allocated by the Railway Company to passenger and \$221.81 to freight, leaving as a common item, \$333.66. We have assumed that of this common item, one-half of it pertains to the track service, which is chargeable to the station account, and have divided this one-half upon the basis of the revenue train miles—freight and passenger; and the other one-half has been divided between freight and passenger upon the basis of the allocations above mentioned, as this half is considered as pertaining primarily to station services, although unable to be allocated, as was the case in part of this account.

Primary Accounts Nos. 67 to 76, inclusive, are the Yard Expenses or the Switching Expenses: They have been considered as 5 per cent. passenger, plus .415 percent of the freight charge, which represents the amount of company material carried chargeable to the passenger

service, so that 5.415 percent. is the amount which has been charged to passenger.

Primary Account No. 80—Road Enginemen—has been allocated between freight and passenger by the Railway Company. From the allocated freight amount has been deducted the .415 percent. charged to passenger on account of the movement of company material.

Primary Account No. 81—Engine House Expenses—Road: This has been divided between freight and passenger upon the engine mile basis, which assigns 83.564 percent. to the freight business; the balance to passenger.

Primary Account No. 82—Fuel for Road Locomotives—has been divided upon the basis of the allocations of the Railway Company, they having allocated \$1,760.98 to passenger and \$30,090.40 to freight, leaving a common item of \$939.72, which latter item has been divided upon the percentage of the above two mentioned amounts.

Primary Account No. 83—Water for Road Locomotives—has been divided upon the basis of the fuel consumed.

Primary Account No. 84—Lubricants for Road Locomotives—has been allocated by the Railway Company and their allocation is accepted.

Primary Account No. 85—Other Supplies for Road Locomotives: The Railway Company have allocated \$55.85 to passenger, \$623.03 to freight, leaving a common item of \$298.99. This common item has been divided between freight and passenger on the basis of the allocations, which assigns 91.773 percent. to freight and the balance to passenger.

Primary Account No. 88—Road Trainmen: This has been allocated by the Railway Company as between freight and passenger, and from the freight proposition has been deducted the .415 percent on account of company material. I should also state that in the preceding accounts—"Fuel for Locomotives," "Water for Locomotives," "Lubricants for Locomotives," and "Other Supplies for Locomotives," these, too, I had the .415 percent. deducted from freight proportion and charged to passenger.

Primary Account No. 89—Train Supplies and Expenses: The Railway Company has allotted to passenger \$1,853.34. and to freight, \$1,748.95, leaving as a common item \$294.59. We have divided this common item on the basis of the allocations, which assigns 48.484 percent. to freight. The usual allowance for passenger material on company trains has been made in this account also.

Primary Account No. 90—Interlocker Block and Other Signal Operations: This has been divided between freight and passenger on the train miles, including switching. These interlockers govern the switching movement as well as the road movement of the trains. This assigns 73.834 percent. to the freight traffic and the balance to passenger.

Primary Account No. 93—Clearing Wrecks: The Company have allocated \$4,127.89 of this amount to freight and none to passenger, leaving \$1,410.50 as a common item. We have examined the pay-

rolls and from them I deduce that \$941.70 of this amount is the ordinary wages of the men who are waiting call on account of wrecks. In other words, of men who would be on duty whether a wreck occurred or not. We have divided this \$941.70 upon the basis of the revenue train miles between freight and passenger, which assigns the amount to passenger as shown upon Exhibit No. 2 opposite this account.

341 Primary Account No. 94—Telegraph and Telephone Operations: This has been divided upon the basis of 20 percent passenger; for the reasons stated in the discussion of Account No. 14.

Primary Account No. 97—Stationery and Printing: All accounts in this block of expenses are divided the same as Account No. 61—"Superintendence."

Primary Account No. 98—Other Expenses: I have divided this upon the same basis as the preceding account.

Primary Account No. 99—Loss and Damage to Freight: This is all a freight item.

Primary Account No. 100—Loss and Damage to Baggage: All a passenger item.

Primary Account No. 101—Damage to Property: Now this is one of the accounts that I took as accruing on the whole year and then dividing it by twelve, as the payments for damages to property would not be made according to the months in which they occurred. I therefore took this upon a year's basis; and this is true with regard to Accounts Nos. 99 and 100—"Damage to Freight" and "Damage to Baggage," both being taken upon a monthly average instead of the amounts charged by the company during that month. This Account No. 101—"Damage to Property"—I have divided by the Company's figures—on their percentages—which give \$114.95 as the freight charge, as shown upon this Exhibit, and the balance to passenger.

342 Primary Account No. 102—Damage to Stock on Right of Way: This has been allocated to a large extent by the Railway Company. We have accepted the figures shown in their report of the annual operations of the road—both freight and passenger—and have divided them by twelve, in order to obtain the amount chargeable properly to this month; it is their total figures, freight and passenger, for the year, divided by twelve.

Primary Account No. 103—Injuries to Persons: This has been to a large extent allocated between freight and passenger by the Railway Company, and we have again taken the monthly average for their total charges as the amount properly chargeable to this month, with the result shown upon Exhibit No. 2 opposite this account.

This completes the division between freight and passenger of the fourth block of expenses—"Transportation Expenses."

The next block of expenses are the General Expenses. We find that of these the Norfolk & Western Railway Company have allocated to passenger \$446.14 and to freight \$1,815.67, leaving as a common item \$7,263.79, which we have divided upon the basis of all of the preceding accounts up to this block of accounts—"General Expenses."

This assigns 87.7483 percent. to freight and the balance to passenger. The reason for treating the General Expenses upon the basis of the preceding accounts is that we consider that the activities displayed by the men under this block of expenses are due to the expenses which have preceded them, and are therefore divisible upon this basis.

This completes the division between freight and passenger for the month of May, 1910, Pocahontas Division, with the results shown on Exhibit No. 2, which have already been quoted in this testimony.

The division of the expenses between freight and passenger for November, 1909, on the Pocahontas Division, and for May, 1910 and November, 1909, on the Kenova Division, has been made upon the same basis as has just been stated in detail for the Pocahontas Division for the month of May. The percentages of weights, train miles and earnings would, of course, vary in each month, but the principle of division is the same for each month and each division.

I furnish herewith for inspection of the Comptroller of the Norfolk & Western Railway Company the working papers, which show in detail the percentages upon these divisions into divisions and months in which I have not gone into details.

Q. 15. Mr. Hillman, will you please file as a part of your deposition a statement showing the operating expenses for the month of November, 1909, and May, 1910, passenger, Pocahontas and Kenova Divisions, and Pocahontas and Kenova Divisions in West Virginia, and mark the same "C. W. Hillman—Exhibit No. 3."

Mr. COCKE: We object to the foregoing question on the ground that it is irrelevant to the issues made in the bill in this case.

A. I file such exhibit herewith, marked "C. W. Hillman—Exhibit No. 3," and would state that it shows the passenger expenses for the months of November, 1909, and May, 1910, on both the Pocahontas and the Kenova Divisions separately, that is the divisions separately, but the months consolidated, the figures being taken from Exhibit No. 2; it also shows in the second and fourth column of figures the amount of the passenger expenses assigned to West Virginia from the Pocahontas Division and from the Kenova Division, in one case being 94.4 percent, based upon the mileage, and the other in the last column, 82.39 percent, also based upon the mileage. There are no further comments on this exhibit excepting that we have assumed in this case the expenses in West Virginia commensurate with the mileage.

Q. 16. Mr. Hillman, will you please file as a part of your deposition a statement showing the operating expenses for the months of November, 1909, and May, 1910, Pocahontas and Kenova Divisions in West Virginia, passenger—intrastate, and file the same as "C. W. Hillman—Exhibit No. 4."

Mr. COCKE: We object to the foregoing question on the ground that it is irrelevant to the issues made in the bill in this case.

A. I do file such exhibit, marked "C. W. Hillman—Exhibit No. 4."

At 1:00 o'clock p. m., a recess was taken until 2:00 o'clock p. m.

The further taking of these depositions was resumed at 2:00 o'clock p. m., pursuant to recess.

C. W. HILLMAN resumed the witness-stand for further examination.

Direct examination (continued).

By Mr. CONLEY:

Q. 17. Mr. Hillman, will you explain Exhibit No. 4, as to the manner of making up and adjusting the items, and any other matters as you desire.

A. Under the first block of expenses—Maintenance of Way and Structures—Account No. 1—Superintendence: This has been divided as is usual upon the basis of all of the accounts in this first block of expenses, from 2 to 17 inclusive, which gives a percentage for intrastate of 56.5731. The expenses for Accounts Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14 and 15 have been divided between inter and intra passenger upon the basis of the passenger miles, inter and intra, the passenger miles on these two divisions for the 346 months we have included being interstate 1,630,346, intrastate 1,630,508, the percentage of intrastate being 50.0036. These are the accounts which show the wear of the tracks due to the passage of the traffic over them. Part of these were brought into the Maintenance of Way and Structures accounts partially upon the basis of wear and part on earnings. The reason for that was that we were then dealing with what we might commonly term "traffics"—the passenger and the freight. Having, however, reduced the amount which it is necessary to replace to the basis of, you might say, homogeneous traffic, that is, all being passenger, and knowing the passenger miles passing over this track, we can consistently divide it upon the basis of the passengers using the track, no matter whether this original expense was incurred through wear or through weather. We have, therefore, taken this basis of the passenger miles as the factor for division. It is claimed that there should be a division in this passenger wear, or a recognition of the effect of the through trains and local trains upon the track, and that the local train is more expensive than the through train. It so happens that the heaviest train upon this whole division which we have under consideration is also the heaviest earning train. It is your train that goes west and passes over that old Kenova Division, which I believe is your train No. 16. I have from Mr. Coxe the earnings per train, and you will find this train, which is a local, is the 347 heaviest earning train that you have on the whole line per mile of train; and, therefore, I have considered that the claim that more intrastate passengers travel on the local trains and between local stations, and that, therefore, a heavier expense should be

attached to them than to the interstate, is not well founded in this case, as this local train, which according to Mr. Cox's statement carries the most intrastate passengers—I am not able to check the figures and I don't think Mr. Cox had the figures, but assumed that on account of making more local stops—as I said, this train is the best train per mile that you have and shows a better earning for miles run. It is evident that as far as that train goes the presumption is in favor of the intrastate passengers and not the interstate passenger.

Q. 18. What Mr. Cox have you referred to?

A. Mr. Cox, the Comptroller of the Norfolk & Western Railway Company, in the testimony already given in this case; I can't quote the page. I have considered that this effect of this heavier train, and, therefore, more economical train, is sufficient to overcome whatever difference there may be from these little branch lines where the intrastate passengers predominate, also as they do upon this heavy main line train. For that reason I have taken all these expenses upon the basis of the passenger miles and so entered them.

Perhaps I should say in this regard that we have also dis-
348 regarded in this computation, to the extent of making it a factor, the percentage of switching which accrues to the passenger as regards to the wear of the track. The reason for that is, that the passengers are not as the freight; on the freight you are obliged to switch a car—it is governed and must be adjusted according to the activities of the road while it progresses, or as it strikes a yard. A passenger train having once been switched and put in position, is put in position for the use of the passengers along this entire run, and the switching therefore accrues on the passenger business upon the same basis as the train run or the passenger miles. A distinction there, which we will make in the freight expenses upon these two divisions for West Virginia, intrastate, is not considered for that reason.

Coming now to Primary Account No. 16—Buildings, Fixtures and Grounds: We find that according to the analysis which I have referred to that 29.34 percent of the repairs due to buildings is a passenger item; that of this 29.34 percent, 60.8402 percent applies directly to the passenger buildings themselves, that is, stations and such buildings as are used directly by such passengers, and that the other portion, amounting to 39.4457 percent, is the proportion of other buildings, such as shops, engine houses, water and fuel stations and road houses, which applies to the passenger department.
349 ment. We have, therefore, taken only station grounds and buildings, which amounts to \$3,599.64, the percentage to intrastate passengers at two to one on the passengers themselves, not on their mileage, because the passengers use these station facilities regardless of the distance they travel. That gives a percentage of 79.6845 as the intrastate passenger proportion of this \$3,599.64, or \$2,868.36. The balance of these expenses, amounting to \$2,344.84, have been divided on the basis of the passenger miles, putting 50.0034 percent as intrastate. The expenses on these buildings accrue per mileage travel per passenger, and not per passenger, as

there is no double terminal in them. That gives a division of the expenses which we have set up here in Account No. 16, and shows the amount set opposite this account in column No. 2 of Exhibit No. 4.

Primary Accounts Nos. 18, 19 and 20, have been divided upon the basis of all the accounts in this block of expenses, 2 to 17, inclusive, the same as "Superintendence," and for the same reasons which I expressed in my discussion of the division between freight and passenger. This assigns 56.5731 percent to intrastate passenger account.

Passing now to the Maintenance of Equipment accounts: All of these accounts in this block of expenses have been divided upon the basis of the passenger miles, there being, as I have stated in the discussion of Maintenance of Way and Structures accounts, no distinction between the switching movement and the road movement as between inter and intra, both being divisible upon the passenger mile basis. This gives us the results which are found in the division of the second block of expenses upon Exhibit No. 4.

By Mr. COCKE: Please state how you obtained your information with reference to the amount of interstate passenger miles and intrastate passenger miles for the two months of which you have just spoken and for the two divisions under discussion?

A. They were taken off independently by my men from the records of the company. I will add to my exhibits the amounts so found by these men on each division, making a separate exhibit. It is not prepared at present, but it will take but little time to do so, and it will be marked "C. W. Hillman—Exhibit No. 4-A."

The next block of expenses are the Traffic Expenses: On Exhibit No. 4 are the Traffic Expenses. These have been divided between interstate and intrastate on the basis of the passenger revenue interstate and intrastate, the passenger revenue, intrastate, being \$31,109.86, the passenger revenue, interstate, being \$38,373.51, the percentage being 44.7731. I have to say in this regard that the intrastate business on every road, or almost every road, is to a great degree tributary to that road, and does not require as much exercise on the part of the traffic men to obtain it; and that, therefore, in assigning the earnings percentage to the intrastate I think I have given it fully as much if not more of the expenses than it is entitled to. But it is the only factor which we have, outside of keeping tab on the activities of the men, that we can base this division upon, and that is, What is the total result of these activities?—whether they put in more time on one of them than the other.

The next block of expenses is "Transportation Expenses"—Primary Account No. 61—Superintendence: This divided upon the basis of all the accounts in this block of expenses, with the exception, of course, of those joint accounts which I mentioned in the division between freight and passenger.

The next account is Primary Account No. 62—Dispatching

Trains: This is divisible upon the basis of the passenger miles, 50.0034 percent to the intrastate.

Primary Account No. 63—Station Employés, and Primary Account No. 66—Station Supplies and Expenses: These are both divided upon the basis of intrastate passengers at two interstate passengers to one, or 79.6845 percent. The Yard Expenses—Primary Accounts Nos. 67 and 76 inclusive, have all been divided upon the basis of the passenger miles, 50.0036 percent to intrastate, for the reasons that I have stated in the discussion of switching in Maintenance of Way and Structures Accounts.

Primary Accounts Nos. 80 to 94 inclusive, have been divided upon the basis of the passenger miles of 50.0036 percent to the intrastate, for the reasons that these are the train expenses which accrue upon the basis of the passengers as they move along, being the train men and the train supplies and expenses, both engine and the other part of the crew; the exception being Account No. 94—"Telegraph & Telephone Operations." This account might possibly, with some show of reason, be considered upon the basis of part of it on the mileage of the passengers as they move over the track, and part of it upon the basis of the passengers taking the trains and leaving the trains, which would give us a slightly increased percentage for the intrastate. I have, however, discarded that distinction in this analysis, for the reason that, as we all well know, much more of our telegraph and telephone operations are in the nature of finding out connections for passengers and reserving sections, etc. for them, and that accrues very largely upon the interstate business. I have treated this whole account upon the basis of the passenger miles. The amount is not very large, however, in this regard.

Primary Accounts Nos. 97 and 98, being general in their character, the same as No. 61—Superintendence—have been divided upon the same percentage of all the accounts in this block of expenses. This percentage is 52.9759.

Primary Account No. 101—"Damage to Property"; No. 102—"Damage to Stock on Right of Way"; No. 103—"Injuries to Persons," have each been divided upon the basis of the passenger miles, as it can readily be seen that the damage or the loss or liability to damage in these cases accrue as per the mileage made by the passengers and not on the number of passengers.

This completes the division of all Transportation Expenses—passenger, between interstate and intrastate, with the results shown upon Exhibit No. 4.

The next block of expenses are the General Expenses, which have been divided upon the basis of all the previous accounts up to this point between interstate and intrastate, for the reason that the accounts expressed under the head of "General Expenses" are for the supervision of the accounts which have preceded them, and, therefore, are divisible upon the basis of these expenses.

This completes the division between interstate and intrastate passengers on the Pocahontas Division, with the results shown upon Exhibit No. 4.

The division of expenses for the Kenova Division on Exhibit No. 4 is made upon the same basis, with the varying percentages which would necessarily accrue to the Pocahontas Division; and I submit herewith the working papers for the inspection of the Comptroller of the Norfolk & Western Railway that he may obtain these various percentages from them.

354 Exhibit No. 4-A, which I propose to file, will show both the figures of the Pocahontas and Kenova Divisions as taken off by my men.

Q. 19. Have you made any computation as to the freight earnings and operating expenses in their relation to intrastate business in West Virginia?

A. Yes, sir; I have.

Q. 20. Will you please file as a part of your deposition such statement showing the operating expenses for the months of November, 1909, and May, 1910, freight, Pocahontas Division, adjusted to intrastate basis, and mark the same as "C. W. Hillman—Exhibit No. 5"?

A. Yes, sir; and I herewith file it as "C. W. Hill—Exhibit No. 5."

Q. 21. You may state at whose request you made up this statement?

A. This statement was made up at the request of the Attorney General of West Virginia, and is intended to show the operating expenses for the intrastate freight in West Virginia. I would say in this connection that the circumstances were such that it was impossible for us to go into the details of the tons and the ton miles to make up the inter- and the intrastate business in West Virginia. We received from the company their statement of the tons and the ton miles upon the earnings of the freight, but these figures were for the entire state, and not having them separately upon the divisions which we had under examination, made it necessary for us to pursue in this case a different method for obtaining the operating percentage of intrastate freight than we did in obtaining the percentage of operation of the intrastate passenger.

355 Q. 22. How did you go about this?

A. We took the freight expenses for the months of November, 1909, and May, 1910, brought over from my Exhibit No. 2 in this case and as far as the Pocahontas Division went, and we then adjusted those figures to an intrastate basis, adjusting them so that if all of the freight had been carried upon the intrastate terms, the second column in this exhibit would have reflected the amount of expenses which would have accrued. It was necessary for us to do this on account of us not having the data before us, and at the time I was spoken to of making this computation, of not having any time to go into the matter.

Q. 23. You mean that you had not the data relating to ton miles on these divisions?

A. My reason for selecting the Pocahontas Division for this purpose was that upon the Pocahontas Division I found that owing to

its mountainous character and the grades that the freight expenses were higher upon this division than they were upon the Kenova Division, or than they would be by logical deduction upon the Shenandoah Division, and that, therefore, if we took the 356 freight expenses upon the Pocahontas Division, we were then taking over into West Virginia as the basis for division the highest expenses which could accrue on freight; and, therefore, the highest expenses which could accrue on intrastate freight.

Q. 24. I understand you to say then that the most expensive division in West Virginia of the Norfolk & Western system is the Pocahontas Division?

A. Yes, sir, the most expensive freight division then in West Virginia.

Q. 25. You may state, if you will, your method in detail of adjusting these expenses to the intrastate basis.

A. In certain expenses the intrastate is heavier than the interstate per ton per mile, both because of the two terminals within the state and because of the lesser average haul over which these increased terminal expenses must be spread; and in order to reduce the total freight expenses of all character to the intrastate basis this extra terminal must be considered, and also the lesser average haul over which the terminal is to be spread must be considered; and in order to determine how tons and ton miles are to apply, we are compelled to reduce all of our tonnage to the intrastate basis, and then divide by our total ton miles of all character into the total expense of all freight when these expenses have also been 357 expanded into the intrastate expenses, which would give us the cost per ton per mile for intrastate freight, but not the absolute cost in dollars and cents, because we do not know just the tons and ton miles to which to apply them. We afterwards have them applied to certain earnings where we can make that basis.

Q. 26. Please explain in connection with your explanation in detail of Exhibit No. 5 what the first column, under the head of "Freight" relates to, and what the second column, under the heading "Adjusted" relates to?

A. The first column with reference to freight names the cost of all the freight on the Pocahontas Division for these two months. The second column represents the expansion of these expenses upon the supposition that all of the freight was moving on intrastate conditions of double terminals and lesser hauls.

Primary Account No. 1—Superintendence—is divided upon the basis of the subsequent accounts 2 to 17 inclusive, as usual. It will be seen from further analysis that this adds to the regular percentage at which all freight should be hauled 52.9569 per cent as far as these accounts go in Maintenance of Way and Structures.

In other words, to haul a ton mile of intrastate freight it is 358 approximately 53 per cent more wear on the track and the structures than it is to haul one ton mile of all freight.

Primary Accounts Nos. 2, 3, 4, 5 and 6, are composed partially of switching and partially of road movement: 7.8452 per-

cent of the total weight of freight is a switching proposition. We have, therefore, taken 7.8452 percent of the total charge to these accounts and set them off by themselves as a terminal expense, that is, to the switching of the freight and which would accrue upon the basis of the tons of freight handled and not upon the basis of the ton miles. We have taken two terminals; therefore our first proposition is two tons for intra against one ton for inter, as far as the switching goes. We have then found from a letter furnished me by Mr. Cox, dated December 4, 1911, wherein he gives the number of tons and ton one mile of the interstate and the intrastate freight. Practically, and this is borne out by reference to Mr. Cox's exhibits filed for the previous years in this case—1909, 1908 and 1907, that the interstate mile is three times as long as the intrastate mile. Therefore in coming down to a ton mile basis it would be necessary for us to increase this difference between interstate and intrastate three times over in order to cover the average mile when we are reducing this to a ton mile basis. We therefore take all these switching expenses which accrued in the accounts I have just mentioned to the intrastate freight and *and* multiply them by six; the balance of the expenses accrue equitably per ton mile, being haulage items. We therefore add to these items which accrue per ton mile our percentage of 7.8452 multiplied by six. In that way we have then reduced these expenses, 2 to 6 inclusive, to the basis of the intrastate expenses. As I said a moment ago, we have, however, neglected the small quantity of intrastate which had already gone in at its higher cost to make up the total of all freight, and in so far as we have included this small percentage of intrastate freight, we have been overcharging intrastate in our summary of expenses; but as this amounted to about 5 percent of the total, it is not a serious matter.

Primary Account No. 8—Tunnels: This is entirely a road expense and accrues equitably upon both classes of traffic according to the ton miles and needs no change.

Primary Account No. 9—Bridges, Trestles and Culverts: This is treated in the same way as Accounts Nos. 2 to 6, by segregating the switching and multiplying the switching expenses by six, in order to bring it to intrastate terms.

We find that in Over and Undergrade Crossings, Grade Crossings, Cattle Guards and Signs, Signals and Interlocking Plants, being Accounts Nos. 10, 11 and 13, that these are divided, not upon 360 the weight basis which we have used, but upon the train mile basis; therefore a much higher percentage, which is 20.9158, must be treated as accruing on the 6 to 1 basis. In other words, the terminals in the case of these accounts amount to 20.9158 percent instead of 7.8452 percent, as in accounts 2 to 6. Proceeding in the same way as on the prior accounts, but on the different percentage, we have charged as marked under the column head "Adjusted" upon Exhibit No. 5.

Primary Account No. 16—Buildings, Fixtures and Grounds: We have segregated these accounts according to their use and filed that on this rough division, of which I have spoken heretofore, that 35.1475 percent of the buildings are upon the basis of 6 to 1 against

the freight service; that is, the proportion of the freight houses and shops, the proportion of the road buildings which accrue to switching, the proportion of the shops and engine shops which should accrue to switching, and the proportion of the water stations, etc. which should accrue to switching, amount to 35.1475 percent of the total. This percentage of the total charge to freight has been multiplied by six and added to the amount which accrues as a regular road expense, which is the other sixty-four and a fraction percent, and which is divided equitably between the two classes of traffic, that is, upon the ton mile basis. This gives us the expansion of this \$15,165.44, the freight charge, to \$29,252.42.

361 Primary Accounts Nos. 18, 19 and 20, being general in their character, partake of the increase which is shown by the increase in Primary Accounts Nos. 2 to 17 inclusive, which adds practically 53 percent to their proportion when reduced to the intrastate terms. This reduces the entire amount of the Maintenance of Way and Structures accounts to the intrastate terms, as shown upon Exhibit No. 5, giving \$159,237.24 as the total, adjusted.

We now come to the Maintenance of Equipment Accounts—Block No. 2: On our Maintenance of Equipment account we have again recognized the division between locomotive divisions in Primary Accounts Nos. 25, 26 and 27, being Steam Locomotives—Repairs, Renewals and Depreciations. We have again recognized the division of the switching part of this charge and the road part of the charge. The switching part of the charge we have taken on the basis of 6 to 1; the road part being even up between the passenger miles. Reducing on this basis we have the figures which are shown opposite this account on Exhibit No. 5.

The next accounts are Primary Accounts Nos. 34, 35 and 36—Freight Train Car—Repairs, Renewals and Depreciation: We have taken these directly as accruing upon the mileage movement, there being no distinction between intrastate and interstate upon these accounts.

362 Accounts Nos. 43, 44 and 45, being the Work Equipment—Repairs accounts, we have taken upon the basis of the Accounts Nos. 2 to 14, inclusive, in the Maintenance of Way and Structures accounts, they being upon that basis, and we have added that percentage to them which showed in those accounts and thus reduced them to the adjusted basis.

Primary Account No. 46—Shop Machinery and Tools; Primary Account No. 48—Injuries to Persons; and Primary Account No. 49—Stationery and Printing: These have been divided upon the basis which shows the increase which had accrued to the freight expenses adjusted to intrastate as above those which were for all freight in this block of accounts.

Traffic Expenses: We have taken these evenly as accruing mile for mile, interstate and intrastate, with the exception that we have cut out account No. 57 from any consideration of any intrastate traffic, this account being "Fast Freight Lines."

Transportation Expenses: Primary Account No. 61—Superin-

tendence: This bears the same proportion of increase as the balance of accounts in the block of expenses would show when adjusted.

Primary Account No. 62—Dispatching Trains: This is upon the straight mileage basis, as we have considered this as a train movement expense entirely, and, therefore, accrues upon the ton miles and not upon the tons themselves.

363 Primary Account No. 63—Station Employés: This is expanded on the basis of two terminals to one and to three to one of the average haul, making a total of six to one of the station employés with reference to interstate and intrastate freight.

Primary Account No. 64—Weighing and Car Service Associations: This has been taken upon the basis of the accounts as three to one; that is we omit in this case the double terminals and only spread it over the average haul, as the Weighing and Car Service Associations would not carry with it the double terminals, in my opinion.

Primary Account No. 66—Station Supplies and Expenses, and Primary Accounts Nos. 67 to 76, being yard expenses, are taken upon the basis of 6 to 1, that is double terminals, and three times the double terminals in order to represent the difference in the average haul of the freight, as these expenses must be spread out over the ton miles.

Primary Accounts Nos. 80, 81, 82, 83, 84, 85, 88, and 89, being road expenses, are taken as accruing between interstate and intrastate on the straight ton mile basis, and, therefore, need no change.

Primary Account No. 90—Interlocking Block and Other Signal Operations: You will remember that 20.9158 percent of this is the switching movement and should, therefore, be taken upon
364 the basis of 6 to 1, while the remaining percentage of the account is straight and remains without change.

Primary Account No. 94—Telegraph and Telephone Operations: This is considered as accruing equally on each set of traffic per ton at the multiple of three to one. It is difficult to accommodate it to the average haul in order to reduce it to the intrastate basis.

Primary Account No. 97—Stationery and Printing, and Primary Account No. 98—Other Expenses: These are the same as Account No. 61, being advanced to the intra-state adjustment upon the basis of the increase shown by the balance of the accounts in this block of expenses.

Primary Account No. 99—Loss and Damage—Freight: This has been taken upon the basis of the straight ton miles, the liability to damage being considered as accruing according to the number of miles that the freight moves.

Primary Account No. 101—Damage to Property: We recognize 20.9158 percent due to switching, and this has been multiplied by six, in order to reduce it to the intrastate figure, and then to that we add the balance as accruing upon the road movement, or straight, without any change between the two.

Primary Account No. 102—Damage to Stock on Right of Way: This accrues according to the ton miles, and, therefore, needs no change.

365 Primary Account No. 103—Injuries to Persons: We again estimate that the liability to injury in the switching movement is six to one and so treat this expense, to which we add the regular road train movement liability to damage upon the straight ton mile basis.

This completes the division of the total freight expenses into the intrastate expenses and gives us the figures which are shown upon my Exhibit No. 5, under the column "Adjusted."

We then expand the fifth division of expenses, that is the "General Expenses," to interstate and intrastate upon the basis of the increase which is shown in the prior accounts, which gives us the figures which are shown upon our Exhibit No. 5, and this gives us a total increase in these expenses of practically $81\frac{1}{2}$ percent per ton per mile; that is, that it costs practically for intrastate freight $81\frac{1}{2}$ percent more per ton per mile than does all freight expenses on the road. If we would excerpt from this intrastate before making the division, this percentage would be slightly decreased, but very slightly. This gives us the cost per ton per mile for all freight reduced to intrastate terms on the Pocahontas Division. If we would include the Kenova Division in this we would have a less cost per ton per mile for intrastate, for the reason that the total freight expenses on the Kenova Division would be less per ton per mile

366 than they would upon the Pocahontas Division. You will find in the later exhibits which I have made showing the rate per ton per mile and the expenses per ton per mile, that the relation between them upon the Pocahontas Division is practically 20 percent of the receipts for the freight expenses, intra-state. If we put in the Kenova Division it would bring this down to about 19 percent. We have not taken the Kenova Division into account, as we desired to show this upon the basis which would indicate the highest expenses. The reason we did not treat the Kenova Division the same way was because we had not the amount of interstate and intrastate on that division so that we could compare the totals and obtain the result, and, therefore, when I said that it would probably make about 19 percent, it is a rough estimate and it is not based upon figures. We are making our final percentage upon these figures that I have explained, showing 20 percent as the operating expenses of intrastate freight.

Q. 27. What do you mean by your reference to 20 percent, as stated above?

A. I mean that if you carry an intrastate freight shipment for which you receive one dollar, that the expenses of carrying that amount to twenty cents.

Q. 28. Have you made up an intrastate passenger statement, in its relation to the State of West Virginia, for the months of November, 1909, and May, 1910?

A. Yes, sir.

367 Q. 29. Will you please file the same as a part of your deposition and mark it "C. W. Hillman—Exhibit No. 6"?

A. Yes, sir, I so file.

Q. 30. Please make such explanation of the exhibit as you think proper.

A. The total passenger revenue on the Pocahontas Division, as will be shown by Exhibit No. 4-A, is \$31,109.86; on the Kenova Division, \$17,285.91. These are the earnings on these two divisions on the basis of the 2-cent passenger rate—not the rate which the road is charging at present, but on the 2-cent passenger rate. I would say that the average per passenger per mile is about 1.94 cents, as shown by these earnings. Mr. Cox's exhibits, for the time when the 2-cent passenger rate was in effect, show practically the same figures, so that there is little or no doubt of these being the correct figures on the 2-cent basis. These figures are for the passenger revenue alone. The by-products of the passenger traffic—the mail, express, baggage, etc., amount to \$17,764.06 on the Pocahontas Division for these two months. We consider 94.4 percent of this as accruing in the State of West Virginia, or \$16,769.27. You will recollect that this is the percentage of the total expenses upon the Pocahontas Division which we took over as representing the West Virginia portion. Now we have these by-products of the passenger business in the State of West Virginia on the Pocahontas
368 Division. We have already taken up and divided all of the expenses of conducting the passenger business, including the expenses which are incurred in hauling these by-products as well as the passengers themselves. Having assigned to the intrastate passenger business 52.9294 percent of the total, we take of these total earnings the same percentage as the equitable amount with which the intrastate traffic should be credited, or \$8,875.87.

On the Kenova Division the total amount of these by-products of the passenger business, and all in West Virginia for the Norfolk & Western road have netted their earnings aggregate on this division between this State and in Ohio \$8,246.21. By reference to our Exhibit No. 4, it will be found that 58.8344 percent. of the total passenger expenses on the Kenova Division is an intrastate matter. We have, therefore, taken our proportion of these by-products of the passenger business on the same percentage as the expenses have been charged us in intrastate, which gives us \$4,851.61. This makes a total passenger earning for these two months in the State of West Virginia credited to intrastate of \$62,123.25; the expenses, according to Exhibit No. 4, were \$57,904.83; the removal of the snow, sand and ice on the Pocahontas Division which we omitted in the original computation amounts to \$79.70; on the Kenova Division it amounts to \$23.34. Adding these two amounts to the total of Ex-
369 hibit No. 4, gives us \$58,007.87, giving us an operating percentage of 93.3754 chargeable to intrastate traffic, intrastate traffic being on the basis of two cents per passenger mile.

Q. 31. What do you find from Mr. Cox's exhibit previously filed in this case as to the relation of taxes to earnings?

A. I found that the relation of taxes to earnings is 3.5 percent. I found that this coincides very well with the taxes upon the entire Norfolk & Western system—everywhere. But I do not agree with

Mr. Coxe that the taxes should be charged up on the earnings basis. I think that the taxes should be charged up on the basis of the expenses, and instead of deducting from the earnings 3.5 percent and adding to it this operating percentage, I have increased the amount of taxes chargeable to intrastate business by the increase in expenses relative to the total expenses which will be shown by intrastate business, making such an increase to charges 4.0449 percent as the tax percentage chargeable to intrastate in lieu of Mr. Coxe's 3.5 percent. This gives us a total of operating expenses and taxes, intrastate, in the State of West Virginia, when calculated upon the 2-cent basis, passenger, of 97.4203 percent.

370 Q. 32. Mr. Hillman, I understand that the Norfolk & Western Railway Company, during the period covered by Exhibit No. 6, charged two and one-half cents per passenger per mile. Why did you eliminate the one-half cent from your calculation?

A. For the reason that I deemed it necessary for us to have this upon the basis which was attacked, which was the 2-cent basis, and to show what the earnings and operating expenses would be upon that basis. If you should wish it added to this, we would add .338 cents per passenger per mile more in order to show it upon the 2½-cent basis.

Q. 33. Have you made any figures combining the intrastate freight and passenger business, so as to show the operating percentage of the total intrastate business in West Virginia?

A. Yes, sir, I have.

Q. 34. Will you file as a part of your deposition such a statement and mark it "C. W. Hillman—Exhibit No. 7"?

A. I file such an exhibit herewith.

Q. 35. Will you kindly summarize your figures for May, 1910, as shown upon Exhibit No. 7?

A. I find that the total intrastate receipts from all sources amount to \$53,653.12 for the month of May, 1910. These are shown in detail upon Exhibit No. 7. I find that the operating expenses for passenger, taken from Exhibit No. 3, are \$32,116.66; the freight operating percentage is 20 percent. (I will state in a
371 moment the figures showing this percentage.) Taking this percentage of the freight revenue in the State of West Virginia, intrastate, \$19,365.00, it gives us \$3,873 as the freight operating percentage, a total operating percentage of freight and passenger of \$35,989.66, or an operating percentage of 67.0784 for the combined traffic. I find that applying the expense basis to the taxes in lieu of the earnings basis, it expands the 3.5 percent used by Mr. Coxe to 6.35 percent for the freight, as shown upon Exhibit No. 7; for the passenger, 4.0449 percent. This gives us the figures shown upon Exhibit No. 7, for the taxes, which amount to \$2,616.60, making the total of operating expenses and taxes, \$38,606.26, or a percentage of operation and taxation of 71.9553 for the intrastate business, freight and passenger, in the State of West Virginia.

The figures for that 20 percent are as follows: The tons one mile for November on the Pocahontas Division were 87,719,632;

for May, 82,905,813; total for both months of 170,625,445. If you divide these ton miles into the \$999,384.07, which I have shown upon my Exhibit No. 5, it gives us an average cost per ton per mile for intrastate freight of .58572 cents. From the letter of December 4th, from Mr. Cox to me, the receipts per ton per mile for intrastate freight amount to 2.9342 cents per ton per mile, the figures being, ton miles 659,968; revenue \$19,365. If we

372 then divide our 2.9342 cents per ton per mile, receipts for intrastate freight, into our expenses per ton per mile for intrastate freight of .58572, we have almost exactly 20 per cent as the cost of operation, the low percentage being due to the exceedingly high rate per ton per mile received for intrastate freight: the expenses for intrastate freight exceeding very considerably per ton per mile those of all freight, and the earnings per ton per mile of intrastate freight being about eight times as great as those of the interstate.

Q. 36. Mr. Hillman, I hand you the fourteenth annual report of the Norfolk & Western Railway Company, for the fiscal year ending June 30, 1910, and ask that you turn to page 7 of that report and state what percentage the interest, rents, hire of equipment, interest on funded debt, interest on trust obligations, interest on collateral notes, rents, track yards and terminals and miscellaneous; in other words, all additions and deductions from income as shown upon the annual report down to the words "net income" on said page 7, omitting the items of taxes which you have already considered in your Exhibit No. 7, and adding thereto the amounts shown upon the same page as "paid out for dividends on capital stock," would be required to show a further expenditure of 23.013 percent in order to be met.

A. This shows that these items would require, in order to
373 be met, as stated upon this general income account, a further receipt per dollar earned; or if expressed in percentage of the earnings, of 23.013 percent.

Q. 37. Please add to that amount the 71.9553 percent which you say reaches the limit of the operating expenses charged to intrastate business, as shown upon your Exhibit No. 7, and give the sum of these two percentages.

A. 94.9683 percent.

Q. 38. Then upon the basis which you have taken, adding the further item which you have not considered in the income account and as shown upon page 7 of the annual report, you have a surplus of how much for intrastate West Virginia business after meeting operating expenses, taxes and other items of debit to income, as stated?

A. A surplus of 5.0317 percent.

Q. 39. Where does the principal division in the cost of handling freight accrue as between interstate and intrastate?

A. The principal causes of the excess cost of intrastate above interstate per ton mile are, first, the fact of having two terminals in the state; and, second, the smaller average haul in the state over

which these terminals are to be spread. This is exemplified by my method of treating these expenses in my Exhibit No. 5.

374 Q. 40. How much of the expenses would you say were affected by this double terminal and by the lesser average haul?

A. I should think about 65 percent would accrue per ton mile and the balance, 35 percent, probably upon ton basis. That is a rough estimate—approximately accurate—near enough I expect.

Q. 41. Referring to Exhibit D-2, filed with Mr. Coxe's deposition, for the year ending June 30, 1909, will you, in addition to what you have already stated concerning the incorrectness of the earning basis for the proration of expenses, make a further analysis of the results coming from his method in the light of the statements that you have just made?

A. I haven't commented so far very severely upon the basis of using earnings as a general factor for the division of expenses. I consider it totally erroneous. It is only applicable in certain particular cases, and as a general factor it is emphatically the worst factor that could be devised for the division of expenses.

Q. 42. Then you do not consider the earnings basis a fair and equitable one?

A. No, sir; I do not. In making the analysis upon this basis it would show that the expenses of conducting intrastate freight were eight to one, in spite of the fact that 65 percent, as I have just stated, of these expenses are train movement expenses and
375 accrue equally per ton per mile; and yet in the final result there would be between seven and eight times as much expense charged to the intrastate business as there would be to the interstate business.

Q. 43. I understand then from your statement that the basis taken by Mr. Coxe, as shown in his testimony and in his exhibits therewith, as between intrastate and interstate, is one for interstate and eight for intrastate. Is that correct?

A. About that on the freight basis; yes, sir.

Q. 44. How about the passenger?

A. The passenger basis of division as used by Mr. Coxe between interstate and intrastate errs on the other side of the proposition, as he has not charged on that basis enough of the expenses to intrastate; but on the other hand there is a serious error, at least I so consider it, in Mr. Coxe's division of expenses between passenger and freight, and when the passenger expenses arrive on Mr. Coxe's basis in West Virginia, they are loaded excessively and do not show the proper division between freight and passenger, the passenger expenses being entirely too heavy everywhere upon his entire system, including the State of West Virginia.

Q. 45. You may state what, in your opinion, would be a proper basis in its relation to the freight business?

A. It would be upon the basis of taking each of the operating
376 ing accounts and dividing them upon the basis which shows the use of each of the facilities for which the expenses were incurred; that is, if I am handling my intrastate freight twice, I should

double the expense of my station service and charge it against intrastate freight; if I am hauling my intrastate freight only one-third of the distance, I must spread that double expense over only one-third. It don't matter a particle one way or the other whether I get twenty or three for it; it don't alter the fact of the expense in the slightest; it has nothing to do with it.

Q. 46. Then instead of it being one to eight, as contended by Mr. Coxe for the railroad company, what ratio should it be?

A. One to 1.815. In other words, instead of an increase of 700 percent, it should be an increase of only $81\frac{1}{2}$ percent.

Q. 47. As a further illustration of the application of the earnings basis for the division of operating expenses, can you show the effect which would be shown on Mr. Coxe's Exhibit No. D-2 by the raising or the lowering of intrastate rates?

A. I have reference in this to a decision in the Federal Reporter, volume 170, in the case of the Southern Pacific Company v. Bartine, et al., by Judge Farrington. After discussing the matter on page 757, in the table on page 758 he shows what the result would be on using the earnings as a basis for the division of expenses. It seems that using the earnings on the basis which the railroad set up gave a percentage of operation of 123.92 percent. If the company had received according to the increased rates which they were asking, the gross receipts would have been \$159,791.40; the cost of hauling, still based upon the 123.92, which they insist upon regardless of the amount received, which is the earnings basis, would have been \$198,013.49, or the loss would have been \$38,222.09. If the lower rates had been in effect, the gross receipts would have been \$103,042.05, the expenses would have been \$127,689.70, or the loss would have been \$24,647.05. The judge then supposes that they had received but \$10,000 for this movement of freight. On the same basis the expenses would have been \$12,392, and their loss on the \$10,000 income would have been \$2,392. If, on the other hand, they had received one hundred times as much for hauling this freight, or \$1,000,000, the cost of hauling upon the earnings basis would have been \$1,239,200, or the freight loss would have been \$239,200. As the judge expresses it: "So long as it costs 123.92 cents in expense for every dollar of income, the expense will increase faster than the earnings. The condition is not nearly so good as that of a rear-end lantern racing with the headlight."

Q. 48. Would the operating conditions or the amount of tonnage be changed in this computation?

378 A. Not at all, sir. If we would suppose that the Legislature should state that the intrastate rate should not be more per ton per mile than the interstate rate per ton per mile, Mr. Coxe's percentage, or the application of the earnings, as Mr. Coxe has done in order to determine the operating expenses, would reduce our operating expenses about one-eighth. If, on the other hand, they should adopt this basis which was adopted in the case I have just read, of three to one, the expenses, as shown upon Mr. Coxe's basis, would be reduced about 60 per cent, and he would have an operating percentage and operating cost of only about 40 percent of that which

he has already shown without ever changing in any sort, shape or way a single penny of the expenses. And that is the reason I say, as might you of the operating expenses as a general factor, that the earnings are absolutely unreliable and ought not to be used, and cannot be used.

Q. 49. Referring to Mr. Cox's Exhibit D-1, filed with his deposition, what have you to say with reference to the amount of expenses charged up by him to the passenger business?

A. I would state that the expenses charged by Mr. Cox to the passenger business are excessive; that they are too high, and that he proves by them that the passenger business in toto is not a paying business, and then having that fact established it makes no
379 difference in the result if we do use the earnings basis for the division between interstate and intrastate, as the total passenger business is already at a loss. Then following upon the same basis of earnings, it shows, to my mind, untruly in regard to interstate and intrastate freight business.

Q. 50. What effect did this overcharge of expenses to passenger business have on his Exhibit D-2?

A. I stated that he brought over his total passenger business into the State at a loss, both interstate and intrastate, and it was then not any particular question as to that loss if we did take it on the earnings basis we would still show a non-remunerative business; and then, of course, if we would accept that basis of division of expenses for passenger, that is the revenue basis, and then take it on the freight, we would be unable, on account of the 7 to 1 basis—on the $7\frac{1}{2}$ to 1 basis of earnings, to charge $7\frac{1}{2}$ times as much to freight traffic, intra-state, as we did to the freight traffic, interstate, or all. I claim, in other words, that the earnings for the basis of the expenses should not be used. There are only very few expenses to which it can be applied.

Q. 51. Ought Mr. Cox's basis be applied to this case?

A. No, sir, I don't think it should be applied to this case; I have stated that pretty fully; and I would state that had the division
380 between freight and passenger been what I considered equitable, Mr. Cox would then have been doing himself an injustice in the passenger business in dividing it this way, between interstate and intrastate, had he brought over his freight and passenger expenses upon what I consider the proper basis.

Q. 52. Have you examined Mr. Cox's Exhibits B-1 and 2, and C-1 and 2?

A. Yes, sir.

Q. 53. Will you state whether they are made up on the same earnings basis, in your judgment?

A. Yes, sir. I would state one further thing, and that is, that there is no one factor which can be taken as the factor for the division of expenses between freight and passenger. The very fact that the Interstate Commerce Commission classified their expenses, and that these expenses are under different heads, shows that they were incurred for different commerce and for different purposes, and for the reason that the Interstate Commerce Commission desired

to know these expenses, that, therefore, no single factor could be applied to them for division between freight and passenger.

Q. 54. Mr. Hillman, combining the revenues from both freight and passenger in relation to intrastate West Virginia business, and after allowing the Norfolk & Western all reasonable operating expenses, and after deducting interest and dividends, what per cent is left to be set apart for surplus, as shown by your exhibits filed with your deposition in this case?

A. After allowing the 23.013 per cent, shown upon page No. 7 of their annual report as being necessary for that purpose, and out of their total receipts, in order to cover the net charges to income and the dividends, there is left but little over 5 per cent, or, to be exact, 5.0317 per cent, to be carried to surplus.

Q. 55. How do you arrive at the per cent of 5.0317?

A. I have shown upon Exhibit No. 7 that the operating percentage of freight and passenger, plus the taxes, amount to 71.9553 per cent. By reference to page 7 of the annual report of the Norfolk & Western road it will be seen that the total operating revenues for 1910 were \$35,053,870.42; it will be seen also that the operating expenses, which we have already considered on Exhibit No. 7, were deducted. To this net sum were added certain general items of credit to income, and from this net result were then deducted certain items of debit to income, included in which were the taxes, which we have already considered under Exhibit No. 7. The net result of these two, then, show the total amount which we should deduct from income net in order to meet the additions which are set forth on page 7 of the fourteenth annual report. In addition to these items deducted directly from the income, there are items which show the dividends paid upon the capital stock—4 per cent on the preferred and 5 per cent on the common. These make an additional amount which it is supposed in this latter computation that the intrastate traffic is bound to make up. These amounts which I have mentioned amount to 23.013 per cent on the total operating revenues. I have added this 23.013 per cent to the 71.9553 per cent, shown upon my Exhibit No. 7, and it produces the result that it costs for these two items 94.9683 per cent, leaving, as I have said, the surplus of 5.0317 per cent.

Q. 56. Will you kindly refer to question 51 and the answer thereto by Mr. Cox, found on page 18 of his deposition in this case, and state whether the method of determining the passenger revenue is a correct method, and could the receipts be definitely determined in that manner?

A. Yes, sir, they could. The method outlined by Mr. Cox defining those earnings is correct for the finding of the passenger revenue, and can be definitely determined from the records and books of the company.

Q. 57. Refer to question 52 and Mr. Cox's answer thereto, as found on page 19 of his deposition, which relates to the determination of the net passenger revenue, as shown by that answer, and state what you have to say about the determination of the expenses on that method?

A. There again is the equalization of all expenses, passen-

ger, upon the same basis; and I have the same criticism as I have passed heretofore upon that basis of determining the passenger expenses, that is, that the common expenses are not divided upon the proper basis between freight and passenger, showing an excessive cost to passenger in his exhibits; and further, when he comes to a division between intrastate and interstate, he again uses the earnings basis to determine the amount of expenses; and I consider that his answer there merely shows his method of determining and does not show from the books and records of the company the expenses in the exact manner that the earnings can be determined, it being to a considerable extent an apportionment of expenses and not the direct expenses themselves. They could not be shown from the books and records of the company without the intervention of a proration; and, therefore, the answer to question 52 is not as authoritative as the answer to question 51.

Q. 58. Refer to question 67 of Mr. Coxe's deposition, found on page 26, and state what you have to say about the question of additions and betterments, as to what they have to do with the operating expenses?

384 A. In that respect in 67 the additions and betterments are taken in as a portion of the expenses, and are so expressed upon Mr. Coxe's Exhibits B-2, and D-2: they are kept separate by themselves. I would say that I do not consider that these betterments are entitled to be deducted from the operating expenses, or considered in the same nature as an operating expense, when the investigation of the sufficiency or insufficiency of any rate is under fire. They are in the nature of additions to the property, and as such are paid for from the operating expenses, or from the gross receipts, and should be considered by the stockholders in the nature of an improved security, and they should not be allowed to make up their improved security from the earnings. It is a question as to whether they shall or shall not be recognized in the issuance of further securities upon the line of the road; and that is a question for the stockholders to decide themselves—whether they will take the accumulation to the value of their property, by the enhanced value of the property, or whether they will issue stock to cover afterwards; but they have no place in the determination of operating expenses—they are a capital account. It may be good business to put them there, and undoubtedly it is, but it is not good business as far as the public is concerned that we should pay for them.

385 Q. 59. What have you to say with reference to Mr. Coxe's answer to question 64, in his deposition, especially that part of it where he elaborates on the further expense item?

A. That was included in my criticism of question No. 67; the two fit in.

Q. 60. Please refer to Exhibit C-2, filed with Mr. Coxe's testimony, and say if the passenger earnings of \$289,943.22, to which Mr. Coxe refers in his answer to question No. 78, take into account any other passenger earnings?

A. None excepting the passenger revenue; that is, the direct

returns from the passengers themselves. The mail, express, baggage, etc. are omitted from that amount which he mentions there.

Q. 61. If the other passenger earnings were taken into account would it not increase the passenger revenues?

A. It would, yes, sir.

Q. 62. Then if you would apply that increased earnings to the capital necessary to conduct intra-state passengers, as given by Mr. Cox in his answer to question No. 78, of \$1,391,902.21, you could then increase his per cent of return, could you not?

A. Yes, sir; if, as stated in his answer on page 30, the set capital allotted to the transportation of intrastate passenger business was \$1,391,902.21, and you would apply these increased earnings to that, you would, of course, obtain an increased percentage of earnings.

Q. 63. On page 40 of Mr. Cox's testimony, in answer to question No. 106, does he include in his answer the other passenger earnings?

A. No, sir, he does not. It is the amount of the passenger revenue, not the passenger earnings: the passenger revenue being that derived from the passengers themselves, and the earnings from the passengers and their by-products.

Q. 64. From your examination of the books of the Norfolk & Western Railway Company, what have you to say as to the cost of earning a dollar of intra-state West Virginia passenger business as compared with the cost of earning a dollar of interstate passenger business?

A. The expense of earning a dollar of intrastate passenger business is in excess of the cost of earning a dollar of interstate passenger business. I can make computations to give that approximately, but I have not done so. It would be necessary for me to divide my passenger miles into my expenses for intrastate and interstate. I could do that, though, if it is desired and give you the figures.

Q. 65. Will you make such a computation and include it in your testimony?

A. Yes, sir. It is as follows:

Q. 66. Do your accounts, as shown by your exhibits, take into consideration any part of the passenger fares received from interstate travel?

A. No, sir; the interstate is entirely eliminated from the earnings, and by my method, from the operating expenses. None of the West Virginia proportion of the interstate traffic is taken into account, either in the earnings or in the method I have of dividing the expenses.

Q. 67. If West Virginia's proportion of the interstate travel had been taken into your computations, would it not have materially increased the passenger revenues?

A. Yes, sir; it would have increased the passenger revenues both gross and net.

Cross-examination.

By Mr. LUCIEN H. COCKE:

Q. 1. As the result of your investigation and study of the books

and papers of the Norfolk & Western Railway Company, in connection with the existence or imposition of a 2-cent intrastate passenger rate in West Virginia, is it or is it not your opinion that such a rate is remunerative to the railway company, considering the revenues derived therefrom and the expenses, which, in your judgment, should be charged against such revenues?

388 By Mr. CONLEY: Objected to.

A. In regard to the question of the remuneration of the 2-cent rate in West Virginia, I would say that the rate is remunerative as regards the direct operating expenses and taxes chargeable against the 2-cent passenger receipts; that when we consider the plant that is necessary to operate the passenger business and the return upon that plant, the rate is not remunerative.

Q. 2. In other words, as I understand, the 2-cent rate about reimburses the Norfolk & Western Railway Company the actual cost incident to doing the service of conducting and carrying the passenger, but gives practically no return to the railroad company for the capital invested and the risks incident to the performance of the service?

A. I should say that the percentage left after the payment of the operating expenses and taxes, is, in my judgment, an inadequate return for the capital employed in the passenger business.

By Mr. CONLEY: Does not your last answer depend upon the method or manner in which the passenger revenues and passenger expenses are adjusted?

A. Yes, sir; it depends upon the method in which the passenger expenses are adjusted between inter and intra; the passenger receipts, inter and intra, are the fixed quantity. It also depends
389 upon the adjustment of the by-products of the passenger business, such as mail, express and baggage.

By Mr. COCKE: Your opinion is based on the adjustment that you have of those respective elements?

A. It is, yes, sir.

At 5:30 o'clock p. m. the further taking of these depositions was adjourned by consent until Tuesday, March 12, 1912, at the same place and between the same hours.

390 The further taking of these depositions is continued on this the 12th day of March, 1912, until Wednesday, the 19th day of June, 1912, at the same place and between the same hours, by agreement of counsel.

Pursuant to the foregoing adjournment, the further taking of these depositions is resumed this the 19th day of June, 1912, at the same place and between the same hours.

Whereupon C. W. HILLMAN was recalled for cross-examination, and testified as follows:

(Examined by Mr. LUCIAN H. COCKE:)

Statement by Mr. COCKE: The Norfolk & Western Railway Company, without waiving its exceptions to the relevency and competency of the exhibits heretofore filed by the witness, proceeds, through its counsel, to cross-examination.

Q. 1. Mr. Hillman, as I understand from the testimony that you have given as the result of your analysis of the cost of doing the intrastate passenger business in West Virginia by the Norfolk & Western Railway Company, it is your opinion that it costs that company more than two cents to carry intrastate passengers one mile.

A. I have made no computations wherein I have separated the cost of carrying passengers themselves from the cost of carrying the other passenger business or the other business conducted on passenger trains, and I am not prepared from the figures I have made to either affirm or deny the suggestion in your question.

391 Q. 2. You ascertained, did you not, that the revenue that the Norfolk & Western received from intrastate passengers was 1.94 cents per mile?

A. Yes, sir.

Q. 3. And you also ascertained that the expense that the railroad company was put to in carrying each passenger was 2.32 cents per mile?

A. No, sir.

Q. 4. If you divide the amount of expense ascertained by you by the mileage of intrastate passengers, do you not reach the result that the expense was 2.32 cents per mile per passenger?

A. Yes, sir; if we divide the total expenses by the passenger mileage we would obtain a cost of 2.32 cents per passenger mile; but this cost which we have set up here is the cost of conducting the total passenger business of all character, including the hauling of what we term the by-products of the business—mail, express, extra baggage, etc., and the expense is not coincident with the figure of the passenger revenue of 1.94 cents per passenger per mile.

Q. 5. You haven't undertaken in any way to separate the cost of doing the mail and express business which is done in connection with the passenger service?

A. No, sir; not in this case.

Q. 6. Have you ever undertaken to separate the cost of doing the mail and express business in any other case?

Question objected to by counsel for defendants.

A. I have in the case of express only. I have not gone
392 into the mail or carrying of baggage.

Q. 7. From the examination you have made as to the cost of carrying express, which examination you said you have made in other cases, is it not your opinion that the actual cost of carrying an intrastate passenger in West Virginia over the Norfolk & West-

ern Railroad is in excess of two cents per mile, not crediting the results of either mail or express to the passenger business?

Question objected to by counsel for the defendants.

A. It would be very hard to predicate an answer to that question in the absence of data on my part or working up on my part of the cost of the mail business. If this is a matter of opinion only, I should say that in rough computation the cost of carrying a passenger one mile in the State of West Virginia was very close to two cents per passenger per mile.

Q. 8. Of course, then, as you have made no analysis of the cost of doing the express business and mail business in connection with the passenger business, but have used the revenue from those by-products as a part of your revenue, your analysis of the cost of doing the passenger business is necessarily incomplete to the extent that that cost would be affected by the cost of these respective items in connection with the passenger service?

A. Yes, sir; supposing, of course, that you refer to the cost of carrying passengers themselves, not of conducting the total passenger business.

Q. 9. When you have heretofore testified that 97.4203 per cent. of the passenger earnings were consumed in paying the passenger expenses, you have included in those earnings not only the earnings derived from intrastate passenger fares, but also the earnings derived from the mail and express business of the company, and extra baggage?

A. Yes, sir; and also some other slight passenger receipts.

Q. 10. Mr. Hillman, in ascertaining what is the cost of doing the passenger business in West Virginia, I believe that you first attempt to segregate the cost of the freight business from the cost of the passenger business, isn't that a fact?

A. Yes, sir.

Q. 11. In ascertaining this cost you take the 116 primary accounts which are kept by the railroad company and divide the expenses that have been appropriated to each one of those accounts, and then you divide those expenses on some ratio which seems to you to be reasonable. In some cases you divide those expenses on the basis of engine miles, passenger car miles, on gross earnings and in other ways, which have been detailed in your testimony.

A. Each account upon the factor which, in my opinion, bears directly on that account.

Q. 12. As I understand it, there is a great variety—there is great diversity of opinion among expert railroad men and other accountants as to what is the proper unit for such division as applied to these various accounts, isn't that a fact?

394 A. There is a certain degree of diversity in obtaining the total results as chargeable to freight and passenger, as you have suggested in your question. I would like further to state that in a large number of these divisions which are made by railroad companies, they are made for the purpose of comparison only, and are not intended to be accurate or even approximately accurate,

notably the division which is made of allocating directly to freight and passenger all the items that are possible, and of using the general factor of train miles as the divisor of all common items.

Q. 13. It is not infrequently the case, I believe, that a railroad company in endeavoring to separate the cost of doing passenger and freight business to appropriate to each class of business those items of cost which are known to belong to that class of the business, and the revenue, and the expenses to be divided between the two classes of business on the basis of car miles, or revenue car miles, or engine miles. That is a fact, is it not?

A. All of those items are used, and sometimes jointly used.

Q. 14. As far as your divisions are concerned in which you go to a more minute and specific analysis of the division of various items, haven't you changed your opinion in respect to what is the proper division a great many times, in considering the various cases in which you have testified and which you have recited in the beginning of your examination in this case?

A. Yes, sir; there have been certain variations in my
395 method on certain accounts from time to time. The principal one was in the case of the Louisville & Nashville Railroad Company in the State of Florida where the relative passenger and freight weights were used entirely as the factor for division in my Maintenance of Way and Structure accounts. There were two reasons for the adoption of this method at the time, one of them being the severe criticism to which I had been subjected in the Minnesota rate case as to my division of Maintenance of Way and Structure accounts into "wear" and "weather," and the further reason that the percentages on the Louisville & Nashville road in the State of Florida, for the different factors upon which the expense would have been divided had I distinguished between wear and weather, were very slight, being less than one per cent. In consideration of these two reasons, I did make the change of my factor in this case. On another case, the Wheeling & Lake Erie road in the State of Ohio, I used a composite factor of train miles and car miles, for the reason that I had no time to use my other factor which I otherwise would have used; and in this case it was a compromise factor, intended to produce practically the same results. I understand that this analysis of mine, or practically this analysis, has been taken by Mr. Muller and applied in the Pittsburg and Lake Erie case, which is also a coal case, without any credit being given to the author of it. In regard to other changes in the method of

division, they were due to the fact of the further and more
396 minute analysis of these accounts, it having been first by me not deemed necessary to be as minute as was required or seemed to me to be required by the criticisms to which I had been from time to time subjected, and the further changes, outside of those which I have mentioned as general, that is, the Florida case—L. & N.—and Wheeling & Lake Erie, have been in the direction of more accuracy than the original computation.

Q. 15. In this case I notice you have come back to the wear and weather stress that you used in the Minnesota case and abandoned

in the Florida case, and also abandoned, I believe, in the Lake Erie case—asserted again in this case as the basis for computation.

A. Yes, sir.

Q. 16. Then, as I understand it, Mr. Hillman, there has not been established among accountants any standard bases for the division of these accounts, in order to ascertain the cost of doing any particular class of business?

A. No, sir. It is a matter which has not yet been determined upon as to an accurate method. I do not know of any concerted action looking to that point as yet made by railroad accountants.

Q. 17. You testified, I think, before the Interstate Commerce Commission in what is commonly known as the Boileau case?

A. No, sir; I did not testify in the Boileau case.

Q. 18. Now, in the Boileau case it appears that there was
397 a summary made of the theory of divisions made by John G. Drew, Frank Nay, B. A. Worthington, C. W. Hillman and J. P. Muller. You are familiar with the names I have just read, and will you state who those gentlemen are?

A. Mr. Drew was at that time comptroller of the Great Northern; Frank Nay was comptroller of the Chicago, Rock Island and Pacific Railway Company; Mr. Worthington is receiver of the Wheeling & Lake Erie Railroad Company, and Mr. Muller was an accountant of the Interstate Commerce Commission at that time, but left them and established an accounting firm.

Q. 19. And the Mr. C. W. Hillman referred to in that case is yourself?

A. Yes, sir.

Q. 20. Each of those gentlemen you recognize as an accountant of character and ability, do you not?

A. Yes, sir.

Q. 21. I will ask you to state what were the divisions on some of the items of account which have to be divided in order to show the cost of doing the freight and passenger business, as testified to by these accountants whose names I have mentioned and whose testimony is summarized in a brief filed before the Interstate Commerce Commission in the Boileau case. I will ask you to give the summary of the division made under Maintenance of Way of cost of ties.

Counsel for defendants objected to the witness being required to testify from a brief prepared by counsel in an entirely separate case from the one in which he is now testifying, the
398 witness having had no part in the preparation of such brief.

In reply thereto, counsel for complainant states that the witness has testified that he is familiar with the various divisions of accounts made by other accountants and the brief is given to him merely for the purpose of refreshing his own recollection as to the divisions summarized in the brief.

Counsel for the defendants object to the witness testifying from the brief under any circumstances, because he had no part in preparing the same and can not know whether it is correctly prepared.

A. I divided the cost of ties between freight and passenger on the basis that $17\frac{1}{2}$ per cent. was due to wear and $82\frac{1}{2}$ per cent. due to weather, the wear proportion being divided upon the relative train weights, freight and passenger, and the weather proportion upon the gross earnings.

Q. 22. How did Mr. Drew divide the depreciation of ties?

A. I do not know.

Q. 23. Will this memorandum refresh your mind?

A. If Mr. Muller is not more accurate in Mr. Drew's method than he was in some of mine, I could not say. I would state, however, in this case he is accurate and that Mr. Drew does use the revenue service locomotive miles.

Q. 24. How does Mr. Nay divide the same item?

A. Mr. Nay divided it on the revenue train mile basis, which was the basis used by Mr. Nay in the Missouri rate case. I happen to be familiar with that. Mr. Nay subsequently, in the Nebraska rate case, made the distinction between wear and weather, and used that in his division of expenses in that case. I happened to have occasion to examine that also, and found that he had used the wear and weather stress.

Q. 25. What percentages does he use for wear and weather?

A. My recollection is that he used $33\frac{1}{3}$ per cent. for wear and $66\frac{2}{3}$ per cent. for weather. It may possibly have been 25 per cent. wear and 75 per cent. weather. It was either one or the other.

Q. 26. How did Mr. Worthington divide this item of tie account?

A. I am not familiar with Mr. Worthington's method.

Q. 27. How did Mr. Muller the expert accountant of the Interstate Commerce Commission, divide this same item?

A. One-half on locomotive miles, including switching, and one-half on the car miles, which was the compromise basis which I mentioned as having been used in the Wheeling & Lake Erie case.

Q. 28. As I understand it, in the Wheeling & Lake Erie case you didn't have time to work out your own theory and adopted Mr. Muller's theory?

A. No, sir; in the Wheeling & Lake Erie case I did not have time to finish the computations I was engaged upon and was requested by the Commission to make a division between freight and passenger and submit the papers, and I made that compromise percentage, which seemed to me would hit the average result. I made it myself. Mr. Muller afterwards adopted it.

Q. 29. Now, take the next item under Maintenance of Way, to wit, rails. How do you divide the expenses of rails as between freight and passenger?

A. 90 per cent. due to wear, divided on the relative weight basis, freight and passenger; 10 per cent. weather, divided upon the relative gross earnings, freight and passenger.

Q. 30. Will you state how Mr. Drew divided the same account?

A. My recollection is that Mr. Drew divided it on the revenue locomotive mileage.

Q. 31. How did Mr. Frank Nay divide the same account?

A. On the revenue train miles.

Q. 32. How did Mr. Worthington divide it?

A. I don't know.

Q. 33. You are not willing to testify as to that?

A. No, I don't know.

Q. 34. How did Mr. Muller divide the same account?

A. I think probably on the same basis he divided his ties.

Q. 35. That is to say, $\frac{1}{2}$ on locomotive miles and $\frac{1}{2}$ on car miles?

A. Yes, sir.

Q. 36. Mr. Hillman, on this account of rails, have you been able to satisfy your mind that 10 per cent. of the depreciation of rails is due to weather?

401 A. Yes, sir; I should say so.

Q. 37. Have you ever examined any rails that have been in the Norfolk & Western track for forty years?

A. No, sir; I have not.

Q. 38. You have had brought to your attention in cases in which you have testified, and I believe notably in the Florida case, that there are rails in service today, where they were subject to very little use, which had been in service for fifty years; isn't that a fact? And in that case they were subject to the depreciation of weather, but practically subject to no depreciation because wear as they were on a practically unused sidetrack or so seldom used that the wear would be very slight.

A. I don't recollect that being brought up in the Florida case, although they did bring up everything that could possibly be brought up; but I don't really recall any instance coming to my mind where the life of a rail having been an unused rail was that long.

Q. 39. Well, now, if we can show in this case that there are rails in the Norfolk & Western track that have been in use for 40 or 50 years, but at a place where the wear is very slight and they are still good rails, would you not be disposed to admit that this distinction of wear and weather, so far as the rails are concerned, is somewhat visionary?

A. No, sir. I might be, however, induced to either reduce or increase the percentage due to the weather operation. The 10 per cent. was taken by me in the Minnesota rate case first, and afterwards confirmed by an estimate made by the Engineer of the Louisville & Nashville road as testified to in the Alabama rate case.

Q. 40. I don't understand, Mr. Hillman, that you are or ever have been a practical operating man of any railroad?

A. Yes, sir; I have been.

Q. 41. What part of your experience do you claim represents your activity as a practical operating man?

A. From 1876 to 1891 on the Cumberland Valley road, branch of the Pennsylvania.

Q. 42. In what capacity?

A. In a number of capacities, first serving on their engineering corps, as telegraph operator, ticket agent, freight clerk, yard clerk,

weighmaster, agent, superintendent's clerk, car accountant, conductor, brakeman, both freight and passenger, which latter service, however, was entirely to qualify me for the position of first assistant train dispatcher and then train dispatcher.

Q. 43. I don't understand that in any of these capacities you were charged with the responsibility of purchasing rails or ties or the construction of bridges or the superintendence of Maintenance of Way or Structure?

A. No, sir; I had none of those responsibilities.

Q. 44. Hence you can not make any of these divisions upon the result of your practical experience day in and day out, as to the cost of the different items that go into the railway accounts, can you?

403 A. Not so far as Maintenance of Way and Structure goes.

Q. 45. Now, Mr. Hillman, when you undertook to separate the cost of doing the two classes of business on the Norfolk & Western road, I don't understand that you took the business of that road for one year and allocated it, but you took a typical month, as you claim, and allocated the cost for that month, and then multiplied it by 12 for the purpose of getting the cost for the year, or you may in some of the accounts have taken it for two months, May and November, and then multiplied the result by six. I don't understand which method you adopted, and I would be glad to have you state that on the record here again, although you may have stated that here before.

A. The division was made for two months, May, 1910, and November, 1909, both included in the fiscal year ending June 30, 1910. I would also state that the expense as found for those two months was not multiplied by six to obtain the expense for the year, but that the cost was established for those two months, and then the resultant cost as shown by those two months was applied to the total year's business; also, that in certain of these accounts, notably the maintenance of Way and Structure accounts, the division was made upon one-sixth of the year's expense for the two months, and not on the amount which was expended during those two months. In a similar way the Maintenance of Equipment expenses were brought

404 down to an average month, based upon the mileage of the cars in various equipment, which was established during the year. The percentage which showed all these various accounts of equipment for the two months as compared with the year was used to bring the expense into the two months; in other words, as you suggested in these two questions, we brought the monthly expense over into the two months and did not show the expenditures during the two months.

Q. 46. Mr. Hillman, as the result of that mode of calculation, you would find out the percentage of expenditures during the month in question which were expended in doing the traffic of that month and its relation to that traffic; if that traffic had been very heavy a portion of the expenditures would be increased?

A. Yes, sir; all your traffic expenses would be increased somewhat, but not greatly. The transportation accounts would bear

a very direct relation, in a large portion of them, to the increased traffic. The Maintenance of Equipment would also be heavier, the equipment being used more in those months. The Maintenance of Way and Structures and the General Expenses would not be affected to a material degree.

Q. 47. If it is a fact that the month selected by you had an excess of traffic over the average, would it not result that your unit of cost would be reduced on account of your excess traffic, and would not the accuracy of your final result depend upon whether or not the month selected by you was in fact an average month?

A. No, sir; it would not affect the result to any appreciable extent, for the reason that I have guarded against that very
405 thing in my transportation accounts. It would leave the only ones that could be affected at all the Maintenance of Way and Structures and the General Expenses, and they would be affected very slightly by an increase or decrease in traffic.

Q. 48. If as a matter of fact it should appear that the character of the traffic of those two months was such as not to represent an average, wouldn't it necessarily affect the figures which you have furnished in this case?

A. No, sir; to a very slight extent only, not material.

Q. 49. Tell us now in what respect they would be affected?

A. They would be affected to the extent of the weights passing over the road, where the weight basis was applied to the Maintenance of Way and Structures accounts; they would be affected in regard to agents' salaries in Conducting Transportation accounts where the agents were paid a monthly salary. The same would not apply to roustabouts around the stations because they would be employed or discharged according to the amount of labor necessary to be performed. They would be affected in regard to telegraph operators, clerks and attendants at stations to a large extent, although they could be varied by the discharge of clerks and attendants in light times. It would vary in the case of the crossing flagman, gate men, switch-tenders and interlockers. It would not vary in the main Conducting Transportation accounts, such as trainmen, engine-
406 men, fuel and water, as these are dependent upon the trains and the number of trains is dependent upon the traffic which is to be handled. There would be a slight variation from this latter statement where the traffic would fall so low that trains would have to be run to handle it yet not be able to fill out the complete capacity of the trains. The General Expenses would affect this result, but in this case, as in others, discharge of certain general office men could be made when traffic is light, and it is so done; but that would be a small saving only. This is a general statement of the case.

Q. 50. I don't think that you discussed Maintenance of Way and Equipment, did you? How about that?

A. On Maintenance of Equipment, the expense which we took over in those two months was based on car miles and engine miles which were used during these months, and is therefore typical of the volume of traffic passing over the line in these months, and I consider that it doesn't affect the final result.

Q. 51. If there was an excessive use of equipment during the month in question, wouldn't that affect the final result?

A. Yes, sir; but you understand that the excess use of the equipment would be dependent upon the volume of traffic which presented itself for transportation; otherwise, it would be bad rail-roading, which I do not think exists on your Norfolk & Western.

Q. 52. How about your Maintenance of Way? You haven't
407 discussed that yet.

A. Yes, I discussed that at the first part of the preceding paragraph, where I stated that the Maintenance of Way would not be affected to a very great extent on account of a large portion of it being upon the weather basis, which is a time unit, and not a wear factor; in so far as the amount due to the wear goes, the taking of 1/12 over into the Maintenance of Way and Structure accounts would affect the total result if the traffic were heavier during these two months.

Q. 53. How many items do you divide on the basis of your gross earnings, which items would be affected in the event the traffic for the month in question was in excess of or less than the average traffic?

A. My recollection of that is that about 52 per cent. of the total Maintenance of Way and Structure expenses would depend upon the weather conditions—I will make that 51 per cent. This is based upon the fact of my calling that in roadway and track expenses, where I counted up the expense divided between wear and weather there was 48 and a fraction per cent. of this account due to wear. On page 16 of my testimony in chief in this case appears this statement: "We find that the percentage of wear as against weather in these accounts which I have mentioned is 48.8606."

Q. 54. Then, as I understand it, 48 per cent. of that class of expenses which are based upon wear would be dependent as far as
408 accuracy is concerned on whether or not the month in question was a good month for traffic or a bad month?

A. Yes, sir; it would depend upon the volume of traffic.

Q. 55. Now, how would the adjustment that you have made affect the short months, take February, for instance, less than 30 days, or a month with 27 working days as against another with 25?

A. The working days in a month are practically obsolete in railroad accounts now. Sunday is a very little different from any other day, save in general office work, and then they have to catch up with the work and it doesn't make any difference. In the case of the month of February, I would never use that month, for the reason that it is a short month. If, however, you take the two months we selected and multiply that by six, you would find that we have 366 days instead of 365 days, which is not an appreciable difference.

Q. 56. When you separate and in order to separate the cost of doing passenger and freight business on a railroad year in and year out, you would not undertake to make your separation based on what you call a typical month would you, if the year's business was reasonably accessible?

A. I would not. I should prefer the broadest basis possible, and

in some cases, notably injury and damage accounts, I would prefer a series of years as a basis rather than one year.

Q. 57. Now, Mr. Hillman, isn't it a fact that if you take a so-called typical month as a basis for your calculations they are not only subject to the objections which you have just recited
409 in the several statements preceding, but also subject to the further objection that in the event an error should occur in your monthly allowance of expenses your error is multiplied twelve times when it is applied to the whole year?

A. If the computations are made in that way, yes; but the computations are not made in that way. We have compared, or I have compared in my statement the earnings and the expenses for the two months and obtained the relation existing between them, and therefore the ratio would be only affected to the extent of the months used. I have not expanded it into the year's business.

Q. 58. But yet the railroad company has to pay the expenses for the year, regardless of what divisions you may see fit to make, and wouldn't it result in the error being magnified 12 times when it comes to the actual payment of the cost of the business which has been separated by you on the theory which you have detailed?

A. It would not magnify it 12 times. It would simply repeat it 12 times. If there was an error, for instance, which should increase my operating and tax cost, as shown on Exhibit No. 6, to 98 per cent. instead of 97.4203 per cent, it would not affect the total result for the year save that on each month there would be .5797 per cent on each month, or that much on the total year's business. It would not be 12 times .5797 per cent.

Q. 59. In other words, the percentage would not be magnified, but the amount of money represented by the error would be
410 magnified 12 times?

A. Yes, sir; in other words, there would be each month a larger percentage expended than is shown here, and it would be the application of, for instance, 98 per cent. to the total year's business instead of 97.4203 per cent. to the total year's business, in order to represent the operating expenses and taxes. Of course, it is understood that the 98 per cent simply is a supposititious figure.

Q. 60. Of course, calculations based on taking a portion of a year are always subject to the criticisms which you admit are reasonably correct?

A. Yes, sir; and it was for that very reason that I made the adjusted expenses which are shown in column No. 1 of my Exhibit No. 2.

Q. 61. But yet the liability to error which you have just recited will occur with the adjusted items just as much as they would with the items of an individual month?

A. Yes, sir; there is always the same liability to make errors.

Q. 62. Mr. Hillman, if you refer to your Exhibit No. 3, my understanding is that that exhibit purports to ascertain the passenger expenses for the months of November, 1909, and May, 1910, on the Pocahontas and Kenova divisions, and that for the purpose of ascertaining the expenses chargeable to West Virginia for the

passenger business during those two months you have ascertained the mileage of the respective divisions in West Virginia as compared to the entire mileage of the respective divisions, and
411 appropriated those expenses to West Virginia on the ratio of the mileage in West Virginia to the entire mileage of the division. Am I correct?

A. Yes, sir.

Q. 63. In your division of the expenses on the Kenova division, I notice that you appropriate of those expenses in West Virginia 82.39 per cent. of the entire expenses, and this, I believe, is based upon the amount of mileage of that division in West Virginia?

A. Yes, sir.

Q. 64. In checking up the appropriations under the last column of that exhibit, which represents 82.39 per cent of the entire expenses of the whole division, we are unable to find that the figures in that column represent 82.39 per cent. of the entire expenses represented in the column just preceding the last; in other words, it appears according to our checking that under the general item of Maintenance of Way and Structures the 82.39 per cent obtains, but that under the succeeding heads of Maintenance of Equipment, Traffic Expenses, etc., quite a variety of percentages are used which are not in accord with the heading of the column nor your explanation of the heading, as appears on page 33 of your testimony. Will you please explain that situation so that we may understand it?

A. With reference to the question which is asked, I would say that my statement on page 33 of the direct testimony is in fault in that it does not fully show the method pursued upon the
412 Kenova division. Upon the Pocahontas division it showed 94.4 per cent. because that much of the division was located in the State of West Virginia and we were without any other data from the books of the company upon which to make this division. Upon the Kenova division, however, we had other data upon which to make this division, and which was used outside of the Maintenance of Way and Structures expenses. The Maintenance of Way and Structure expenses were taken upon the basis of the track mileage, 82.39 per cent to the State of West Virginia, as stated upon my direct examination, page 33. Under Maintenance of Equipment accounts, however, we had the car mileage and engine mileage furnished us on the books of the company, splitting the Kenova division into West Virginia and Ohio, that is, from East Williamson to Kenova and from Kenova to Portsmouth. The percentage of the engine mileage in West Virginia amounted to 61.5315 per cent, and upon this basis accounts 25, 26 and 27, the Steam Locomotive Repairs, Renewals and Depreciation, were divided. The passenger train car percentage shows the percentage of 63.097 per cent assigned to the division from East Williamson to Kenova, and that percentage of the passenger train car repair, renewals and depreciation was assigned to the State of West Virginia. The books show that 62.4283 per cent of the freight car mileage accrued, upon this same division, in the State of West Virginia from East Williamson

to Kenova, and the proportion of the freight car repairs was divided upon this basis to West Virginia. The Work Equipment accounts, 43, 44 and 45, were divided upon the basis of track mileage, viz: 82.39. The remaining accounts in this block of expenses, viz: 24, Superintendence; 46, Shop Machinery and Tools; 48, Injuries to Persons; 49, Stationery and Printing, were divided upon the basis of all the other accounts in this block of expenses which assign 62.7068 per cent. to West Virginia.

Passing on to traffic expenses, we have the expenses divided on the basis of the earnings, respectively in West Virginia and in Ohio, of the Kenova division, which percentage is 64.383 per cent., the total of the transportation expenses having been assigned to West Virginia upon the basis of the passenger car miles to 62.4283 per cent. I fear here that I will have to make another computation, as the freight car percentage which I quoted as being the amount upon which the freight cars were divided was the passenger car percentage, after making an allowance for the amount of material carried on company trains, of .415 per cent. The General Expenses were divided upon the basis, which we have used heretofore, of all the other expenses up to this point, which assigns 65.38 per cent. of the General Expenses to the State of West Virginia.

Q. 65. The result of your last answer is, as I understand it, that in ascertaining the expenses of doing the passenger business in West

Virginia, as far as the Pocahontas division is concerned, you divided your expenses on the basis of the mileage of that division in West Virginia, and so far as the Kenova division was concerned you divided the Maintenance of Way and Structures on the basis of the mileage in West Virginia as compared to the entire mileage of the division, and so far as all of the remaining expenses were concerned you divided those in a variety of ways, namely, by engine miles, train miles, and other modes of division that seemed to you appropriate?

A. That seemed to me appropriate and to bear directly upon the expenses involved.

Q. 66. And the result obtained by the different modes of apportionment on the two divisions involved in your investigation must necessarily be inaccurate, must it not?

A. Yes, sir; inaccurate in the sense of mathematical accuracy, but not in the sense of practical accuracy, at least so far as the Kenova division would go. I regretted very much that I was compelled to take the 94.4 per cent. as representing the Pocahontas division expenses in West Virginia, but there seemed to be no other way out of it than that.

Q. 67. You have used different theories of apportionment.

A. I would hardly call them different theories of apportionment. I have apportioned the expenses in different manners, for the reason that in the cost of the Pocahontas division I had no details to make the same apportionment which I had upon the Kenova division. I call it rather a bending to necessity than a change of method. It was only to make that distinction that I answered your question as I have.

Q. 68. Mr. Hillman, I believe in addition to making an attempt to ascertain the cost of doing intrastate passenger business in West Virginia you have also undertaken to ascertain the cost of doing intrastate freight business, have you not?

A. Yes, sir.

Q. 69. When were you requested to make up a statement of the cost of intrastate freight business?

A. It was some time after we had left your comptroller's office, and if my recollection serves me, it was not very long before the hearing, although it had been suggested to me previous to that time that I should separate inter- and intrastate freight, but I was unable to do so for economic reasons connected with the State of West Virginia.

Q. 70. Had you finished your passenger report at the time you were requested to make up the freight report?

A. I don't know whether I had finished it or not. I will say, however, in that regard, up to that time the State of West Virginia had not been informed of any of the results and that the request came from them to do that other work if it was a possibility to do it. I can not say whether or not at that time I had reached the final conclusion.

Q. 71. For the purpose of illustrating your theory of the cost incident to the conduct of the intrastate business in West
416 Virginia, I believe you have filed your Exhibit No. 5. Is that not true?

A. Yes, sir.

Q. 72. This undertakes to ascertain the expenses of the intrastate freight business for the same months of November, 1909, and May, 1910?

A. Yes, sir.

Q. 73. I believe it is generally accepted that the cost of doing intrastate freight business and intrastate passenger business exceeds the cost of doing all other business of any railroad?

A. Yes, sir.

Q. 74. The elements, according to your testimony, as I understand it, which produce an excess cost in doing the intrastate freight business are two, viz: the necessary existence of two terminal charges to the intrastate business and the fact that the average haul of the intrastate freight is only one-third as long as the average haul of all other business over those divisions?

A. Yes, sir; that is correct when we consider the interstate business with reference to only one state. I want to define that, because every piece of freight must have two terminals, but when considered with the state as a unit interstate would have but one as a general proposition.

Q. 75. The only elements which you have considered in fixing the amount of excess cost are the elements just mentioned, to-wit,
the subjection of intrastate freight to the cost of two terminals,
417 and because of its being carried on a short haul whereby the expenses would be distributed over less mileage, and hence would rise by reason of that fact?

A. Yes, sir; the static expenses, as we call them, would be distributed over less mileage and would be heavier per mile carried.

Q. 76. You have treated the entire road of the Norfolk & Western in West Virginia as being main line track?

A. No, I can hardly say that I have done that. I have treated it as a unit, whether main or branch.

Q. 77. And your figuring has been based on the unit of so many miles of track and so much business, regardless of any differentiation as to whether some of that business was done on branch line at excess cost and some done on main line at average cost?

A. Yes, sir. I have made no distinction between the branch and main line.

Q. 78. Do you not think, as a general proposition, that the intrastate freight business is necessarily to a large extent operated at branch line expense and not main line expense?

A. No, sir. The main difference in the cost accruing between branch line and main line, or, I might say, between what we call way freights and through freights, is due to the less than carload stuff which is carried on trains, as the excess wages paid to the men and the excess crews carried on way freights is due to the fact
418 that they carry peddling or less than carloads.

Q. 79. Isn't it due also very largely to the fact that in intrastate freight you don't have the benefit either of your car capacity or your tractive power of the engines?

A. The question of car capacity is due entirely to less than carload freight, whether it be intra or inter, I don't know. There being not many distributing points for less than carload stuff in the State of West Virginia, I would omit that from my computation, considering that l. c. l. freight must necessarily be largely interstate in the State of West Virginia. With reference to the second part of your question, as to the tractive power of the engine, there is undoubtedly an expense which would accrue to the short haul possibly from not working the engine to its full capacity. It might be possibly from the distribution of traffic—that these drag freights or pick-up freights coming in along the road would be unable to keep the tonnage full on account of the flow of traffic from different points. But I would say, as a general proposition, there would be a difference—the short haul traffic costing more than the other on this account.

Q. 80. As a matter of fact, taking all the elements into consideration, isn't it reasonable to suppose that freight which is handled on a branch line of very thin traffic is done at an expense four or five times or perhaps eight or ten times as great as the same volume of traffic done on the through trains of a road with a busy main
419 line?

A. No, sir; that is not my experience. I should say that the branch line cost per ton mile would be not to exceed two and one-half times the main line through cost.

Q. 81. Those are about the figures which you give in your exhibit, are they not, as to the excess cost of intrastate freight business in West Virginia?

A. I don't know. I haven't made the computation per ton per mile.

Q. 82. Don't you say that the cost of doing intrastate freight business in West Virginia is 5.95 mills per ton per mile?

A. I made the cost per ton per mile for intrastate freight .58572 cents or practically 5.86 mills.

Q. 83. Now, do you not attribute the excess cost which brings the cost of doing intrastate freight up to that sum wholly to the two causes which you assign as reasons therefor, viz: the two terminals and the lesser haul?

A. It is based entirely upon them.

Q. 84. Now, if in addition to having the two terminal charges and have- the short mileage that freight, or a substantial portion of it, is hauled at branch line expense, do you say that that freight wasn't hauled at any additional excess cost?

A. It was hauled at an additional cost provided it was hauled at branch line figures.

Q. 85. Did, rather do I understand you to claim that a
420 less than carload shipment that is carried in a full train from Kenova to Welch, two points on the main line of this road, can be handled at the same expense that a similar amount of traffic on a ten mile branch of the railroad which perhaps runs local freight with four or five cars once a day or once a week or whatever it may be?

A. No, sir; the main line cost is less, as a general proposition, than the branch line cost, as the branch line, as a general thing, runs on a way freight schedule.

Q. 86. Mr. Hillman, as a plain practical proposition, there can't be the slightest doubt in the mind of anyone that a branch line freight business or passenger business with the thin traffic that necessarily results from that character of road must be done at a greater expense than main line or through traffic: isn't that a fact?

A. There isn't any doubt that it is more expensive per ton mile or per passenger mile.

Q. 87. How much of the Norfolk & Western in West Virginia is main line track and how much branch line track?

A. I haven't those figures before me, sir. I don't know.

Q. 88. Mr. Hillman, for your information, I will state that for the year upon which your figures are based, the main line track for the Pocahontas division of the Norfolk & Western in West Virginia was 103.46 miles and the branch line track of the same division was 141.15 miles, making the branch line's mileage on this division 57.7
per cent of the entire mileage of the division. Now with
421 those figures before you, and considering the fact that the traffic on this division of the road is operated or conducted

on so large a percentage of branch line track, are you not of the opinion that the cost of this traffic must largely exceed the estimates which you have made when you have based those estimates on only two elements of excess cost, viz: the two terminals and the shorter hauls?

Counsel for defendants object to this question because it is based upon figures that are not in the record, either in the pleadings or in the evidence.

A. No, sir; not necessarily, for the reason that I have made this computation for intrastate traffic. This branch line which you mention in West Virginia is used for both kinds of traffic—inter and intrastate. There are no figures at hand to show how much the interstate or intrastate predominates on either main or branch line; and therefore, until that was determined, we could not determine whether or not I had overestimated or underestimated the intrastate expenses.

Q. 89. Now, Mr. Hillman, has the statement you have just made any relevancy to the theory on which you have undertaken in Exhibit No. 5 to ascertain the intrastate cost because you have taken the general cost and then raised it to the intrastate basis on the presumption that all of your business was done at the same cost and none on branch lines? Now what has your intrastate business on branch lines to do with the proposition that we are now investigating?
422

A. It has this to do with it; that in your question you are asking me to assume in the first place that a large portion of the business of the Norfolk & Western is done on branch lines, which is undoubtedly true. How much does not appear, according to the record. You are then in your question asking me to assume the fact that this branch line business is intrastate or that the largest portion of the branch line business is intrastate, to which I am not at all ready to answer yes. The confusion exists, I think, in your confusing branch line business with intrastate business.

Q. 90. Well, I asked you to assume that 47 per cent of the intrastate tonnage is exchanged with branch lines on the Pocahontas division, and I now ask you whether or not, if that large percentage of the intrastate business is exchanged with branch lines, the excess branch line cost should not properly be reflected in your estimates of the cost of doing the intrastate freight business?

A. Yes, sir; it should be, provided, of course, that the percentage of interstate business expressed in ton miles will bear less percentage than this 47 per cent which you asked me to assume as to the intrastate tonnage on branch lines.

Q. 91. What is the character of interstate business on the Norfolk & Western arising on the Pocahontas division?

A. I know that a large proportion of it is coal.

Q. 92. And you know, also, the fact that all of that coal
423 has long hauls—all of the interstate?

A. Yes, sir; all of the interstate has long hauls on the Norfolk & Western system.

Q. 93. It has long hauls on this division, has it not?

A. A considerable proportion of it has; but fully half of it has not, going to tidewater, averaging about eleven miles on this division.

Q. 94. Then, as I understand it, you claim that even though practically one-half of the West Virginia freight business is done

over the branch lines of the Norfolk & Western road, that in spite of that fact you can ascertain the general cost of doing intrastate freight business without making any allowance for that half?

A. No, sir; I have never made that claim, either in my direct testimony or here. I have made the computation which I said I considered an approximate cost, which I believe I stated in my direct testimony ignored the way traffic as against the through traffic. The question of the absolute or accurate determination of that would necessitate the examination of the classes of tonnage which used the branch lines and which used the main lines, which I have not made.

Q. 95. In other words, your investigation of the cost of doing intrastate freight business in West Virginia has not gone far enough for you to predicate, with reasonable accuracy, as to what the cost of that business is?

A. I would hardly like to answer that question, using
424 "with reasonable accuracy." I would like to put it half way between what you call mathematical accuracy and reasonable accuracy. I would state, for this reason, that in the cost which I trebled, doubled or sextupled, I included the cost of doing all this high-cost business of which you speak, and therefore I have taken into account, six times over in some cases, all this branch line cost which you mention, three times over in others, and twice over in other cases. I have not segregated the branch line and main line cost and trebled, or doubled, or sextupled that, but I have taken the high cost, including branches and all, and including double terminals, and have multiplied that by two, three and six. I don't know whether I have overestimated or underestimated the cost in these cases. If you desire an opinion on it, I am willing to risk one.

Q. 96. Isn't that basing a guess upon a guess?

A. No; it is offsetting an unknown quantity which tends to one side of the account against an unknown quantity which you know tends to the other side, and therefore it is not an accumulation of error, one on top of the other, but it is a reduction of error. Whether the error on one side of the account would overbalance the error on the other side is a matter I don't know. That is the reason I made the statement between mathematical accuracy and reasonable accuracy; it was for just that reason.

Q. 97. Now, one large element which you attribute as a
425 basis for excess cost of doing intrastate business in West Virginia is the element of cost involved in the two terminals. Did you reflect on the fact that much of this business is done with three and four terminals?

A. Do you mean of the intrastate business?

Q. 98. Yes.

A. No, sir; I didn't make that computation, for the fact would militate against that, that the interstate business also has intermediate terminals; it has intermediate yards; it has branch handling at branch terminals, etc. Therefore, I allowed it to remain as it stood, two to one.

Q. 99. If you had followed out in my allusion the handling—I wasn't referring to the movement that occurs in the coal movement by reason of making up trains at Vivian yards, to which I have no doubt you refer; but I am referring to the fact that in the conduct of this branch line business, as you have observed from your examination, I doubt not, it will be consigned, say from Kenova to a point on a branch line, but will not be sent directly to that branch line, but will go to Bluefield to be from there distributed so as to be carried in a train that is going up to a branch line, and so with other movements: which makes me say that a substantial portion of this business is subject not only to two terminals, to which you allude, but to three terminal expenses and in some cases to four terminal expenses. Your familiarity with that division will verify the facts implied by my question.

426 Counsel for defendants object to counsel basing his question upon facts which nowhere appear in the record.

A. Yes, sir; that has been taken into consideration, for the reason which I have just spoken of a few minutes since, that the interstate is always subject to those changes when it goes on branches or comes off branches or is changed at a terminal station and carried forward in another train. I have made computations of that character, and I would say that both classes of freight will oftentimes run as high as eight handlings. For that reason I have allowed the two to one to stand, because the double handling or triple handling is not confined to intrastate business, but the interstate also has its double and triple handling.

Q. 100. Did you undertake to compare the cost of making up a carload of coal in a train of coal at the division point with the cost involved in transferring a carload of package freight at the terminals where a breaking-up of the freight has to be made in order to get it out on a little branch line train?

A. No, sir. The cost of handling merchandise that is less than carload freight is much greater in every way, of course, than handling carloads. It is at least twenty to one.

Q. 101. Well, in these handlings of interstate freight, does it involve the handling and transfer of less than carload stuff?

A. Certainly it does; and we must not lose sight of the
427 fact that all our less than carload freight is not intrastate; that a great deal of interstate freight is less than carload, and is of course, subject to the same number of handlings and the same changes in handlings and various handlings, as the intrastate, but not quite to the same extent.

Q. 102. Can you go further than that? Can't you say that the general character of intrastate freight is local or less than carloads, as compared to the same volume of interstate freight?

A. I would not do so without an examination of the records of the company. As I stated a few minutes since, there are no heavy distributing points for intrastate freight in West Virginia.

Q. 103. But isn't the amount of intrastate freight in West Vir-

ginia comparatively small, and have you any reason to believe that the ratio of less than carload freight as compared to carload freight is any different, so far as you have observed, from the general experience of such business in railroad operations?

A. Yes, sir; I have reason to believe so, and the reason is as I have just stated, the lack of distributing points in the state. As regards the actual amount and the relative percentages of less than carloads of interstate and intrastate, I have no advice and could not judge, beyond what I have stated.

Q. 104. I refer now to your Exhibit 5, and before making any further inquiry on the subject, I will ask you the theory on which it is made up.

428 A. It is made up on the basis that every terminal expense occurs twice on intrastate to once on interstate; further, that the average haul of this intrastate is only one-third that of interstate freight. These are the bases of the adjustment to intrastate made by me on Exhibit 5.

Q. 105. Then, I understand that you have taken the figures which were the result of your divisions between the freight and passenger for the two adjusted months and set the sum of those figures to all the freight cost of the Norfolk & Western for the respective months, and now for the purpose of getting the intrastate freight costs you have taken each one of these items of cost and raised it to an imaginary figure because you say that if that freight had been carried at intrastate cost the figures would have been raised to that sum. Is that a fact?

A. No, sir; they would not have been raised to that sum, as I stated in my direct examination, for the reason that included in these figures which I have raised is already this excess cost of doing intrastate business whatever it may be. I should say that this is what might be termed the maximum cost on this basis of doing the intrastate business, or the tonnage raised to its adjusted maximum.

Q. 106. Well, this is the first time we have heard of that being a maximum cost, and I have assumed heretofore that you gave these imaginary figures as being the true cost and not a maximum cost.

429 Do I understand now that you do not rely on these figures as being accurate but that they do afford evidence of a boundary line of cost?

A. On page 48 of my testimony in chief I said, "We have, however, neglected the small quantify of intrastate which had already gone in at its higher cost to make up the total of all freight, and in so far as we have included this small percentage of intrastate freight we have been overcharging intrastate in our summary of expenses; but as this amounted to about 5 per cent. of the total, it is not a serious matter." I would further say that I have already expressed myself upon this matter of maximum cost and as to the accuracy of this method of division. I don't consider it accurate, but I consider it strongly indicative of the cost.

Q. 107. I notice that in this Exhibit 5, having in your first column set down the cost of various items accruing on the Pocahontas di-

vision under the head of the several accounts mentioned, you then proceed to add in round numbers in some cases, say, 25 per cent., in other cases 50 per cent., in other items you double, in other items you multiply by six, and set such resulting figures over to the column of your adjustment of the business had it all been done at the cost at which intrastate business is done. Will you now state whether all of these additions are attributable to what you call the excess cost involved in double terminals and the shorter haul?

A. Yes, sir; they are.

Q. 108. I will ask you this: in so adjusting these costs
430 was it not necessary to indulge in a very large element of speculation or conjecture as to how much should be added to what you claimed to be the real cost that you had ascertained in order to raise these costs up to an intrastate basis of cost?

A. No, sir; outside of the fact of not determining the amount carried on through and local trains. The other matters had been taken care of in these computations.

Q. 108. I will now ask you what excess cost you added to the wages of road enginemen, Account No. 80?

A. Account No. 80, road enginemen, is a movement expense and is considered one to one, ten to ten, in movement between inter and intra.

Q. 109. But haven't you testified that these road enginemen made only one-third of the mileage—

A. No, sir; I haven't.

Q. 110. The mileage on the intrastate is one-third of the mileage of the other freight?

A. Yes, sir.

Q. 111. And these enginemen only made, as far as intrastate is concerned—they made only one-third of the mileage?

A. No, sir; they made the miles. They don't carry the freight near as far; but in both characters of freight the expense accrues per ton mile carried. They do only have to carry the freight one-third the distance.

Q. 112. But those enginemen, if they were paid, as you
431 known enginemen are paid, 100 miles for carrying it 40 miles, does not the road suffer if you only fix the wages for the 40 miles of haul, on an intrastate haul, when on an interstate movement they carry it the full 100 miles and the road gets the benefit of that revenue?

A. That comes to the same proposition that we had before; that is, on these local trains there is interstate freight and intrastate freight. These local trains push off the freight wherever it is necessary, pick it up wherever it is necessary. They are doing this for both classes of freight. Because the haul of intrastate freight is only 40 miles, it does not mean by any means that the engineer is getting the 100 mile pay for the 40 mile haul of any class of freight.

Q. 113. I understand that that does not necessarily follow, Mr. Hillman. But as a matter of fact, do you not know that on a branch line the enginemen do get a 100 mile pay for a 25, 40, 60, or 70

mile haul; and that that more certainly occurs in regard to short hauls than on the main line business, and if you are going to raise the cost of doing your business from the actual cost of intrastate business, should not you recognize the fact that the expense of enginemen and trainmen *are* greater on that class of business than it is on the average run of business?

A. No, sir; you are assuming there again as a fact that all short haul freight and all other branch line business is due to
432 intrastate and consists of intrastate. I have stated that I did not take into consideration, nor have I taken into consideration here, the extra cost of doing the way business as against the through business, nor do I know, nor had I means of knowing, the amount of intrastate business and interstate business which is handled on these short runs. There is no engineman, however, that gets 100 miles pay for 25 miles run. He would be doubled up on his run. He would be taken in and out and make his double run.

Q. 114. I will now read to you from the rules and regulations of the Norfolk & Western Railroad in regard to the payment of enginemen: "For short runs not provided for of a distance less than 50 miles, 100 miles will be allowed either straightaway or turnaround. For a distance of 50 miles or over, 100 miles will be allowed at mileage rates, but should a short run of a distance of over 50 miles be doubled and the round trip commenced within nine hours and five minutes of the time of reporting for duty at the starting point for the going trip a full round trip will be paid for at mileage rates, and over time for time in excess of eleven miles per hour for freight service and twenty-five miles for passenger service, plus the thirty-one minutes before overtime began."

Counsel for defendants object to counsel for the railroad company reading into the record anything as evidence when he has not qualified as a witness, and here moves to expunge the same from the record.

Q. 115. Now, assuming that to be the regulation of the
433 Norfolk & Western, are you not mistaken in saying that the enginemen and trainment do not get the full pay for these short runs?

A. I don't say that they do not get the full pay for short runs. I do say, however, that no railroad would run its business on a basis of a 25 or even a 40 mile run at full 100 mile pay. It says in these rules, "unless otherwise provided for". You may be sure that they are provided for. There are exceptional cases, however.

Q. 116. Doesn't the fact that you have figures the interstate haul at three times as long as the intrastate go to prove the additional fact that whatever excess cost the railroad company may be put to in connection with their enginemen on short hauls ought to be reflected in the cost of doing intrastate business?

A. No, sir, it does not. If that freight were consolidated in one point where it would necessitate a 40 mile haul, where your enginemen could run 40 miles, and it was so arranged by the company that they should receive 100 miles pay, and I mean when I say

arranged, that by necessity the company must pay the enginemen, that they could not get out of it, then it would be a charge against intrastate freight to that extent. But the intrastate freight does not run in consolidated blocks. It is picked up and set off all along the line, and the engineman can make his hundred miles, be paid for his hundred miles, and still have an average haul of only 40
434 miles on intrastate freight, on account of pick-ups and set-offs. He may also have several short hauls on intrastate freight.

NOTE.—Counsel for the railroad company state that they will furnish to the Attorney General a copy of the rules and regulations for rates paid, and any selections therefrom may be referred to as a part of the record of deemed expedient by either of the parties.

NOTE.—But counsel for the defendants do not consent that any part of the book of rules or regulations shall be made a part of the record without witnesses testifying to the same.

435 C. W. HILLMAN, the witness who was on the stand at the time adjournment was taken on yesterday, was at this time recalled for further examination by Mr. Cocke, and testified as follows:

By Mr. COCKE:

Q. 117. I think you testified in the proceedings before the Inter State Commissioner, commonly known as the "Lake Rate Case?"

A. Yes, sir; I did.

Q. 118. In that case you attempted to make an analysis of the cost to the Norfolk & Western Railway Company, of hauling all coal, and what is known as lake coal?

A. Yes, sir; I did.

Q. 119. What was the general character of the trains in which coal is hauled on the Norfolk & Western, as shown by your testimony in that case—I mean especially with reference to the amount of tonnage on the trains?

A. I didn't investigate especially the tonnage on the trains. I did, however, make an investigation of the amount of coal which was handled on way trains, that is, I mean by that, the train which carried the "peddling car" of the way train; I don't mean the pick up and set off train, because the wages for picking up and setting off train, are on the same basis per hundred miles as the through trains, which depends entirely upon the engine for the engineers, the class of engine used; but the way train, that is the train carrying the "peddling car", has the extra addition to the wage schedule, and on that train, there was very little coal carried.

436 Q. 120. The great majority of the trains that carried coal, according to your recollection and your investigation, were comparatively solid coal trains?

A. They were. Well, I didn't make that investigation. That was made by the Inter-State Commerce examiners under Mr. Lyon, and those records are on file, but I don't recall the percentage of coal. He took 15 trains and ran them up as to the coal percentage.

Q. 121. Well, was your investigation sufficient for you to testify that those trains carrying coal averaged some 1,700 or 1,800 tons per train?

(Counsel for the plaintiff objected to the foregoing question because it is irrelevant.)

A. I have a recollection, from what source I don't know—I could not say whether it was from personal investigation of the testimony, that these Norfolk & Western trains carried a very heavy percentage—a very heavy tonnage—I expect somewhere near what you have mentioned. I should say, however, that that is my recollection; concerning the through line trains, I am not informed concerning those trains on their shorter runs reaching the main line from the branches.

Q. 122. What is the common average lading of local merchandise trains or others, carrying the general run of intra-state freight?

A. There is no such train.

Q. 123. Of course I understand that that train will carry interstate as well as intra-state freight, but I am referring to the character of trains that stop at each of the local stations, for the purpose of making local deliveries, commonly known as the way train—
437 local freight.

A. Before answering that question, I will have to get you to particularize it. Do you mean the peddling train, the one that carries the peddling car, or do you mean the combination of the way train, which carries the peddling car, and what they call the pick up and set out freights, as against through freights?

Q. 124. I mean the pick up and set out?

A. Pick up and set outs would run 75% on an average of the lading of through trains.

Q. 125. How about the peddling train, that stops at the local stations for the purpose of receiving and delivering local freight from station to station?

A. You mean by that less than car lots from station to station?

Q. 126. Yes, sir?

A. On those trains they only would carry—would carry only on an average of 40%. I should think, as a general proposition, 40% of the tonnage of the through trains, that is terminal to terminal trains.

Mr. CONLEY: What did you mean by lading of through trains?

The WITNESS: I mean by that, terminal to terminal trains.

Mr. COCKE:

Q. 127. Those local trains, whether consisting of pick ups and set offs or of peddling local freight, are not double-headers, are they?

A. That I could not say.

Q. 128. From your experience, you would not think it
438 possible for them to be double headers?

A. I should say that from the experience, I should deduce that the way freights—I mean by that the one that carries the ped-

dling car—would not necessarily be a double header. I am unable to say concerning the others.

Q. 129. What did you ascertain to be the cost of hauling of coal on the Pocahontas Division, both in the aggregate amount—both in the amount in dollars and cents, and the rate per ton per mile?

A. That I cannot recall.

Q. 130. By reference to the exhibit which you filed in the late coal case, does it not appear that you assigned as the cost for hauling coal—of hauling all coal on that division, the sum of 173,-358.31?

(Counsel for the defendants object to the foregoing question because it does not show what the testimony relates to, and because it was testimony supposed to be in another case and relating to interstate freight.)

A. 131. I will now ask you whether or not the amount of expense which you ascertained for the hauling of coal to which you have just alluded is not for the month of May, 1910, the sum of to which you have just now alluded, is not for May, 1910, the same month concerning which you are testifying in this proceeding?

A. The amount is \$173,358.31.

Q. 132. Now, what would the ton mile that you ascertained was coal that was carried for that amount of money during the month of May, 1910.

439 (Counsel for defendants objects to the foregoing question for the reason that it relates to testimony in another case, and relates only to coal shipments, and does not relate to the general freight business of the company.)

A. That is 53,719,376.00 were the ton miles of revenue, upon which the company collected revenue during the month of May, 1910.

Q. 132. Now, will you state what was the rate per ton per mile—I mean the expense per ton per mile, based on the expense and the revenue ton miles carried, as you have just stated?

(Counsel for the defendants objects to the foregoing question for the reason that it relates to testimony in another case, and relates only to coal shipments, and does not relate to the general freight business of the company.)

A. If we consider the ton miles upon which revenue was collected as the amount of ton miles upon which the expense accrued, the expense would be 3.22 mills per ton per mile.

Q. 133. I will ask you to turn now to your Exhibit No. 7. According to that exhibit, I understand that you estimate that the amount that the Norfolk & Western Railway Company expends, 71.95 per cent of the revenue it derives from its intra-state freight and passenger business, in paying the operating expenses of those two classes of its business, including taxes?

A. Yes, sir.

Q. 134. You have further testified that the Norfolk & Western Railway Company out of its revenue is at other charges in the
440 — of interest, rents, hire of equipment, interest on funded debts, trust obligations and other items shown on page 7 of the Annual Report of the railroad company for June 30, 1910, and that you think certain for the revenues from these two classes of business to pay their proportion of what the railroad company was compelled to pay for these two items, that such proportion would amount to an additional charge amounting to a percentage of 23.013 per cent of those expenses, in order that these classes should pay their pro-rata proportion of the fixed charges of the railroad. Am I correct in reciting your conclusions?

A. In answer to your question, I will say that I have added directly to the operating percentage which I have found, the percentage which is shown by the annual report to have accrued on the annual report, necessarily to have accrued on each dollar of earnings in order to meet the income charges, which sum amounts to 23.013 per cent, and which, when added to 71.9553 per cent of operation shown upon my Exhibit No. 7, makes the sum of 94.9683 per cent.

Q. 135. How much surplus of expenses would be then allowed under your computation for the other expenses of the railroad, not enumerated by you or provided for in your calculation?

A. Upon the basis which I have just named, there would be left 5.0327 per cent as a surplus. As regards other expenses of the railroad company they being covered by their operating expenses and their income account, I, of course, have provided for nothing else after going that far.

441 Q. 136. As a matter of fact, any well conducted railroad is at other expense, in addition to what you have provided for, is it not?

A. They expend other amounts of money for improvements, betterments of their line—I mean by line, of course all the railroad facilities, not directly the track.

Q. 137. Do not, frankly speaking, don't you think that you have, in that calculation—that the calculation which you have furnished, shows at best, a very meagre allowance for other expenses to which the railroad is put, and which have to be paid and reckoned with, when you consider the uncertainty and vicissitudes surrounding the operation of the railroad, and the extraordinary expenses which come to it in the recurring ways?

A. You ask me now to go into a discussion of general railroad financing, and I don't know how far I really ought to go into that. There are certain expenses which you have mentioned, which come in line of the improvements which it is necessary for you to make, but every dollar of those improvements add to the value of your property necessarily, and are capital expense. If the stockholders choose to reinvest their money in their road, they are surely entitled to do so, and I consider it good, conservative business that they should reinvest their money, and it is a reinvestment of their money, a reinvestment of their surplus, but as to whether or not there should

be an allowance made for that in making rates or not, is a question which is rather too broad to go into at present. As to the
442 second point of your question, as to whether a surplus should be set aside to meet operating contingencies such as expense, I may refer here to one matter which would illustrate what I mean, which was the flood in the Gulf of Mexico, whereby an immense amount of damage was done which had to be replaced, and which, of course, would necessarily become an operating expense. If such conditions could be shown to be on any road such as the Norfolk & Western, there is no doubt that the expenses as shown should be thrown over a number of years and thereafter added to the operating expenses, or, in other words, the operating expenses increased to meet such contingencies, provided they could be shown to occur at certain intervals, extending over a series of years, but the data would have to be on hand to show that.

Q. 138. I will ask you this: You are reasonably familiar with the location and business of the Norfolk & Western Railroad, and you know the fact that a large portion of the road is operated through mountainous territory, and that this is especially true with regard to that certain section of the road going through the State of West Virginia. Do you not know it to be a fact, that a road of that character is subject to sudden floods, which destroy certain portions of the track, and should not a surplus be accumulated for repairing those disasters?

A. Those disasters are entirely chargeable to the operating expenses. It would depend absolutely upon what year you were using; that is, the question would occur: "Did in this year which we are
443 examining, any such contingency such as we are examining, occur any more than in the ordinary year," I say you would have to extend it over a series of years in order to determine that fact.

Q. 139. Well, considering the facts which you have just recited, do you not consider that the 5% surplus the expenses which your estimate apparently allows for, a very meagre allowance?

A. That is, I say I could not tell without knowing or entering into an investigation of whether in this year these contingencies occurred, against which we were to provide. If none of them occurred this year, and it was an absolutely normal operating year, without any of those contingencies, and it could be shown that it did occur in other years, and were, of course, liable to occur again, there should be an allowance made for them, I don't know how much.

Q. 140. Then the question in your mind is, that if the year 1910 was abnormal in its payments for extraordinary expenses such as you have alluded to, then the allowance of 5% might be sufficient, but that if it was not representative, it would not be sufficient?

A. No, sir, if the year should be abnormal, I would say we would not allow anything for the year. The idea of the allowance is to make up for such deficiencies or for such accidental occurrences, and that in a year where those occurrences happen, you would expect to draw on the previous years where you had laid aside a surplus under

those circumstances; therefore, it goes to an average of a series of years.

444 Q. 141. I notice that, in your allowances for expenses, you take no account that the railroad has to pay surplus in discount and commission on securities sold. Do you not think that is a proper subject for consideration?

A. Absolutely, no, sir; no, sir.

Q. 142. You don't?

A. No, sir. The discount or securities should be met from the pockets of the stockholders and not from the rates.

Q. 143. In that respect you differ from President Hadley, and his commission who have filed a report concerning railroad securities?

A. I don't recall the quotation there, but I don't think that I do differ from him in that.

Q. 144. Now, it happens that in the report that you examined, the actual expense for the year 1910, that the company was put to in disposing of its securities, was the sum of \$41,878.08. Now, I understand that, according to your theory of accounting, that no provision should be made in the operation of the company for the payment of that item of expense, so far as rates are concerned?

A. None whatever, and I am led to — conclusion by experience in several roads. The most extreme case that I know of, where out of six million dollars, thirty-three hundred dollars was charged to discount on bonds, Florida East Coast, second mortgage bonds.

Q. 145. You don't mention the figures which you have just given, as having any relation whatsoever to any item of charge which the Norfolk & Western has to pay bankers in the regular course
445 of business in marketing their securities?

A. The difference is only in the amount which they have to pay, not in principle.

Q. 146. The difference in the amount would seem to be the difference between one per cent and fifty per cent, would it not?

A. The difference of the amount is—I don't know what—how many bonds they sold, but I accept your statement that it was one per cent commission paid, and that the relation was as you have stated. I should say here, in order not to appear radical, that I do believe a reasonable discount on bonds would be allowable and charged to the capitalization of a railroad at a reasonable discount.

Q. 147. Do the rules of the Inter State Commerce Commission permit the amount which you have just suggested?

A. They do not.

Q. 148. Well, however valuable may be the suggestion which you have made, it is one that the railroad company cannot avail itself of?

A. They are allowed to carry it in an accounting and spread it over the years of the life of the bond, and to charge that up to—I reckon profit and loss, or what else.

Q. 149. Some old thing?

(Counsel requested that the foregoing question be eliminated from the record, which is accordingly done.)

Q. 150. Now, it is true, as shown by your analysis of the annual statement of the Norfolk & Western Railroad for the year ending June 30, 1910, that that company, out of its earnings, was unable to pay to its common stockholders, a dividend greater than 5%, which was the rate at which the dividend was paid?

A. Yes, sir.

446 Q. 151. Suppose that the stockholders had received 6% dividend. What would have become of the surplus which you state exists from these two classes of business?

A. If there had been paid to the common stockholders 6% instead of 5%, it would have added 1.877 per cent to the 23.013 per cent, which I have mentioned, making the total payments 24.89 per cent.

Q. 152. In other words, it would then reduce your surplus to about 3.15 per cent of expenses?

A. Yes, sir.

Q. 153. Now, Mr. Hillman, you have examined all of the annual reports of the Norfolk & Western Railroad Company, and know the fact that the year 1910 was the most prosperous year that the road has had?

A. That I could not say. I have not looked back over the reports, nor am I sufficiently familiar with them to say so.

Q. 154. If it should appear that the year ending June 30, 1910, in which fiscal year the two months are embraced which you have examined as the basis of your accounting, was the most prosperous year that the Norfolk & Western Railroad Company has had, do you not believe that an accounting based on that year is hardly fair as a basis for the calculations which you reach in your testimony?

A. The conclusions which I reach in my testimony, are conclusions of fact, based entirely on the year 1910; as to whether that should be the basis for the decision of the ultimate question
447 for which this investigation is undertaken, that belongs to an entirely different body and it does not belong to me, and I don't care to go into that question.

Q. 155. Well, as an accountant acquainted with the ups and down of a railroad, do you believe that any system of accounting based upon a year's work, especially if it should appear that the year selected was the most prosperous year, could give the proper information upon which to base a judgment as to what is fair and just and right with reference to railroad rates?

A. That is a point that I would not go into. That belongs, as I say, to the determining authority which has the case in hand.

Redirect examination.

By Mr. CONLEY:

Q. 156. Mr. Hillman, on cross examination you were questioned to a considerable extent as to whether or not the months of November, 1909 and May, 1910, were fairly typical of the business for the entire year, and whether or not the results based upon those two months, would be approximately correct for the entire year. What have you to say as to that?

A. Yes, sir; I think they would be.

Q. 157. Will you please give some data tending to show this result?

A. Take for instance the passenger train miles for the year on the Pocahontas Division. There were 443,058 passenger train
448 miles; one-sixth of this would give a total for the two months of 73,842; on the Kenova Division in West Virginia there were for the year 182,741 passenger train miles, one-sixth of this representing the two months would be 30,456, making the total in West Virginia on these two divisions of 104,298. The actual figures were as follows: Pocahontas Division, November 34,672, May 41,332; Kenova Division, November 14,940, May 15,681, making a total of actual miles run of 106,645, as against the two months average of 104,218, a difference of 2.2% only. The passenger earnings for the same period and for the same divisions show a total average for the two months of \$123,003.76; the actual earnings for the two months were \$121,640.05, a difference of about 1%. The passenger car miles for the two months averaged 600,758; the total actual passenger car miles for the two months was 601,015; the variation in the earnings and the car miles between the actual and the average being five-tenths of one per cent, the variation in the earnings between the annual and the monthly averages being about one per cent. Since the passenger earnings are less, and the car miles—engine miles—are more, it would indicate that the expenses which we have taken for passenger in these two months, are very slightly above the passenger expenses for the year but not enough to create any serious discrepancy. All of the above figures are taken from the records of the company and are not figures of my own. These records show the figures monthly and show a yearly total; in calculating the one-sixth, I have simply divided their yearly total as
449 shown by the records by six in order to obtain the average for two months. The other figures are the actual figures which occurred during each of the months in question; therefore, these figures are the actual figures from the records of the company.

Q. 158. By reference to your testimony in chief on the fourth day of March, 1912, you said you had left out certain mileage on the Shenandoah and the Radford Divisions, aggregating about 40 miles. Can you give the percentage and the figures which would show how much intra-state business was not taken into account by reason of leaving out the mileage above referred to?

A. The intra-state passenger miles for West Virginia during the two months in question, May, 1910, and November, 1909, were 2,570,632 passenger miles; on the Shenandoah Division there were 30,170 intra-state passenger miles; on the Radford Division there were 43,450 passenger miles, a total of intra-state passenger miles on those two divisions that was left out of our computation of 73,620 passenger miles, with a percentage of 2.87% on the total passenger mileage. In other words, we have computed the cost for 97.13% of the total passenger mileage. It can readily be seen that the 2.87% would not materially change the result, even when the conditions upon which it had been hauled would have been adverse to the

state's contention of cost. The above figures in this last answer can be checked up from "Exhibit C. W. H. 4-A."

Q. 159. Mr. Hillman, on page—at the top of page 16 of your deposition in chief, in speaking of primary account No. 5, you used the following: "It is divided upon the same basis as the preceding account No. 4, for the reason that other track material is coincident with the rails." Do you wish to make any explanation of that statement or add anything thereto?

A. Yes, sir, I don't wish that to stand as co-incident with the rail. It is *to* definite. I want to say it is probably co-incident with the rail, because we know that the rail, the switches and other material included as track material, does not exactly follow the rail, but it is subject, probably, to the same conditions as to rust and wear, and I want to be careful on that point for several reasons. In other words, I am trying to get statistics on these points to see what variations there would be, if any, in the percentages and factors which I have taken from the data which I have to date. All data which I have used here is subject to corrections as fast as I can get the figures, otherwise, I am no good.

(Counsel for defendants without waiving the exceptions to the question asked by counsel for the railroad company on cross-examination, so far as they relate to other cases, now proceeds to examine the witness thereon.)

Q. 160. Mr. Hillman, you were asked on cross examination concerning the different methods shown in a brief filed before the Inter State Commerce Commission, one of which was called the Boileau case. Do you know who prepared that brief, or the portion of it relating to the different methods of division between the freight and passengers as shown in it?

A. Mr. J. P. Muller who is an accountant in that case, is an ex-commissioner—I mean by that an ex-accountant of the Inter
451 State Commerce Commission.

Q. 161. With reference to the methods set up in the brief by Mr. John G. Drew, Comptroller of the Great Northern road, and Mr. Frank Nay, of the Chicago, Rock Island and Pacific Railroad, do you know if these methods are considered by them as accurate?

A. No, sir; they are not. They are considered for comparative purposes only—comparative operating purposes—to check operating efficiency.

Q. 162. You have been asked concerning extra cost on branch line trains on the Pocahontas Division. Are these branch line trains used principally for inter-state business or intra-state business?

A. That I don't know. I have no data on that subject whatever as to whether they are or not.

Q. 163. Is it not a fact that a large number of the branches of the Pocahontas Division are branches up to coal mines, and that the coal business of the Norfolk & Western is to a very large extent the business of those branch lines?

(Counsel for the railroad company objects to the foregoing ques-

tion, for the reason that the witness has already stated that he does not know the character of the business on the branch lines, and also objects to the suggestions contained in this question.)

A. Yes, sir, that is a fact; most of them or a large portion of them are run up to coal mines, and the coal business is to a very
452 large extent, considerably above 90% interstate.

Q. 164. Could you say whether or not the short lines which it is claimed extra pay accrues from haulage on account of their shortness, occurs on branch line runs or on the main line run?

A. That could only be determined by an investigation of the pay rolls of the company.

Q. 165. Have you made such an investigation?

A. I have not; no, sir.

Q. 166. Do you know whether or not they occur on the so-called way trains of light tonnage or on the trains carrying the heavy tonnage?

A. No, sir, I could not say from direct knowledge, but I should say that way trains—the way train runs are arranged by schedule, and that they would be arranged so that an extremely short haul would not occur on the way trains; it would occur on the through trains and the pick-ups.

Q. 167. You were questioned at considerable length on cross examination about the multiples of 2, 3 & 6 as used by you. Is it not a fact that any figures to which you apply that multiple in order to determine the inter-state cost per ton per mile with all of the cost, were included in the original figures which you did so apply?

A. Yes, sir, the entire cost, whether it was on short runs or long runs, was included in the total figures which I multiplied by two, three or six.

453 Q. 168. Will you explain why you used these multiples?

A. I used the multiple two, to provide for the extra terminals, intra-state; I used the multiple three, to provide for the length of the average haul, in order to spread my terminal charges over the length of the haul.

Q. 169. I believe you stated on cross examination, that you used 20% as the approximate cost of handling intra-state freight in its application to the Pocahontas Division. Will you state whether this division is the most expensive division on the Norfolk & Western Railroad?

A. In the State of West Virginia, yes, sir, it is the most expensive division. The 20% was derived from the operations on that division, and then applied to the entire business in the State of West Virginia, both on the Pocahontas and the Kenova Division.

And further this deponent saith not.

(By consent of counsel the signature of the witness C. W. Hillman, to the foregoing deposition is hereby waived.)

454 STATE OF WEST VIRGINIA,
Kanawha County, To wit:

I, John C. Bond a Notary Public in and for the aforesaid county and state, do hereby certify that the foregoing deposition of C. W. Hillman was taken at the times and place and for the purposes herein above specified, before me in my said county of Kanawha. Given under my hand this — day of July, 1912.

JOHN C. BOND,
Notary Public, Kanawha Co., W. Va.

(My commission as notary expires April 10, 1921.)

(Here follow pasters marked pages 455 to 463.)

464 (And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 15th day of March 1913.)

In Equity. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY

VS.

WM. G. CONLEY, Attorney General, et al.

This cause came on this day again to be heard upon motion duly served upon all the defendants; upon former motions made and the papers heretofore read herein, upon the joint and separate answer of all the defendants filed herein, and general replication thereto, upon former orders and decrees heretofore entered herein, upon depositions taken in behalf of the plaintiff and defendants filed herein, and upon the motion of the defendants to dismiss the preliminary injunction heretofore granted herein on the 28th day of August 1909, and upon the motion of the defendants to require the plaintiff to receive, take up and pay for the coupons issued by it under a former order of this Court, entered on said 28th day of August, 1909, and was argued by counsel.

Upon consideration of all of which, and after maturely considering the same, the Court is of the opinion, and doth find, that chapter 41 of the Acts of West Virginia Legislature for the year 1907 is constitutional upon its face, and that the two cent passenger 465 rate thereby imposed is not confiscatory in fact as to the plaintiff, the Norfolk & Western Railway Company.

It is, therefore, adjudged, ordered and decreed that the temporary injunction heretofore issued herein against the defendants, and entered on the 28th day of August, 1909, be, and the same is, hereby dissolved as to each and all of them. And, the defendants moving the Court to provide a manner in which the coupons issued by the plaintiff under said order of this Court entered on the 28th day of August, 1909, can be redeemed, it is further adjudged, ordered and decreed that, as the coupons may be presented, the plaintiff do receive and redeem from and pay to the respective parties holding the same, through its proper agents at each of its pay stations in the State of West Virginia, the coupons issued by it under said order of this Court, entered as aforesaid on the 28th day of August, 1909; and this cause is retained upon the docket of this Court, in order that any of the parties thereto may petition for the aid of the Court in the enforcement of this decree, in the event such aid should become necessary.

The plaintiff desiring to apply to the Supreme Court of Appeals of this State for an appeal and supersedeas in this cause, on its motion, this decree is hereby stayed for sixty days in order to give the plaintiff an opportunity to perfect said appeal.

466 STATE OF WEST VIRGINIA,
Kanawha County, ss:

I, Ira H. Mottesheard, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true transcript of so much of the record in the cause of Norfolk & Western Railway Company, a corporation, against Wm. G. Conley, Attorney General, and others, as I was requested by counsel to certify.

Given under my hand and the seal of said Court this 5th day of May 1913.

[Seal Circuit Court, Kanawha County, West Virginia.]

IRA H. MOTTESHEARD,
Clerk Kanawha Circuit Court.

Transcript \$201.50.

467 (And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 14th day of May, 1913.)

In Equity. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY

vs.

WILLIAM G. CONLEY, Att'y Gen., et al.

On this, the fourteenth day of May, 1913, came the plaintiff, the Norfolk & Western Railway Company, by its counsel, Holt, Duncan & Holt, and, at the same time, came the defendants, by A. A. Lilly, Attorney General of the State of West Virginia, and it appearing to the Court that on the 15th day of March, 1913, a final decree was entered herein in favor of the defendants, and against the plaintiff, and that by said decree the terms thereof were stayed for the period of sixty days, in order to enable the plaintiff to apply to the Supreme Court of Appeals of the State of West Virginia for an appeal from and supersedeas to said decree; and it further appearing to the Court that said application has been made to the Supreme Court of Appeals of the State of West Virginia for said appeal and supersedeas, and that the same has been refused and denied by said Court; and it further appearing to the Court that the plaintiff now desires to apply for a writ of error to the Supreme Court of the United States, in order that the decree of this Court aforesaid, as well as

468 the order of the Supreme Court of Appeals of the State of West Virginia in denying an appeal from and supersedeas to said decree may be reviewed by the Supreme Court of the United States, and it further appearing that a further suspension of the said decree of the 15th day of March, 1913, entered herein is necessary in order to give the plaintiff fair and ample opportunity to obtain its said writ of error. It is, therefore, adjudged, ordered and decreed that the final decree entered herein on the 15th day of March, 1913, dissolving the injunction heretofore awarded herein

on the 23 day of August, 1909, be, and the same is hereby, suspended, and said injunction is continued in force for the period of thirty days from this date, in order that the plaintiff may, within said time, apply for, obtain and perfect its writ of error from the Supreme Court of the United States in the premises. The defendants and each of them, through A. A. Lilly, Attorney General for the State of West Virginia, excepted to the ruling of the Court in granting the foregoing stay, and entering the foregoing order.

469 (And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 10th day of June, 1913.)

In Chancery. No. 2207.

NORFOLK & WESTERN RAILWAY COMPANY

VS.

WM. G. CONLEY, Att'y Gen., et al.

This day came the Norfolk & Western Railway Company, by counsel, and presented in open Court a writ of error allowed by the Chief Justice of the United States on the fourth day of June, 1913, to the final decree in this cause, accompanied by the petition and assignment of errors presented to the Chief Justice, and upon which said writ was allowed, and, at the same time, tendered and filed in open Court a bond in the penalty of five thousand dollars (\$5,000), approved by the Chief Justice, and conditioned for the prosecution of said writ of error to effect; and it is, thereupon, ordered, in obedience to said writ of error, that the Clerk of this Court transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings of the above entitled cause, with all things concerning the same, and return therewith the original writ of error, as well as the citation to the defendants, with the evidence of the service thereof, together with said petition for the writ of error and the assignment of errors.

470 (Bond referred to in the foregoing order is in the words and figures following, to-wit:)

Know all men by these presents: That we, the Norfolk & Western Railway Company, a corporation, as Principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation, as Surety, are held and firmly bound unto the State of West Virginia in the full and just sum of Five Thousand Dollars (\$5,000) to be paid to the said State; to which payment well and truly to be made the said Norfolk and Western Railway Company and the said United States Fidelity and Guaranty Company bind themselves, their successors and assigns jointly and severally by these presents. Sealed with our seals and dated this 27th day of May, 1913.

The condition of the above obligation is such, that whereas, the Norfolk and Western Railway Company seeks to prosecute its writ

of error to the Supreme Court of the United States to reverse a certain judgment or decree rendered by the Circuit Court of Kanawha County, West Virginia, on the 15th day of March, 1913, in a certain Chancery cause therein pending wherein said Norfolk and Western Railway Company was plaintiff and W. G. Conley, Attorney-General of the State of West Virginia, and others, were defendants;

Now, therefore, the condition of the above obligation is such, That if the above, bounden Norfolk and Western Railway Company, plaintiff in error, shall prosecute its said writ of error to effect and answer and pay all costs and damages that may be adjudged against it if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.]

NORFOLK AND WESTERN RAILWAY
COMPANY.

By WM. G. MACDOWELL, *Vice-President*.

Attest:

E. H. ALDEN, *Secretary*.

[SEAL.]

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By HENRY STEVENS,

Resident Vice-President.

Attest:

RHEO. HURTT,

Resident Secretary.

Approved the 4th day of June, 1913, by

EDWARD D. WHITE,

Chief Justice of the United States.

472 In the Circuit Court of Kanawha County, State of West Virginia.

In obedience to the command of the within writ of error, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings of the within entitled cause, wherein the Norfolk & Western Railway Company was plaintiff, and W. G. Conley, Attorney General for the State of West Virginia, et al., were defendants, with all things concerning the same; and I likewise return herewith the original writ of error, together with the citation thereon, and the acceptance of service thereof by A. A. Lilly, Attorney General for the State of West Virginia, as well as the original petition for the writ of error and the assignment of errors presented with the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the Circuit Court of Kanawha County, West Virginia, this 10th day of June, A. D., 1913.

[Seal Circuit Court, Kanawha County, West Virginia.]

IRA H. MOTTESHEARD,

Clerk of the Circuit Court of

Kanawha County, West Virginia

473 Supreme Court of the United States, October Term, 1912.

No. —.

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

W. G. CONLEY, Attorney General for the State of West Virginia,
et al., Defendants in Error.

Petition.

To the Honorable the Chief Justice and Associate Justices of the
Supreme Court of the United States:

Your petitioner, the Norfolk and Western Railway Company, respectfully represents that it is aggrieved by a final decree entered against it by the Circuit Court of Kanawha County, West Virginia, on the fifteenth day of March, 1913, in a certain equity cause then therein pending, wherein your petitioner was plaintiff, and W. G. Conley, Attorney General for the State of West Virginia, et al., were defendants;

That, after said decree had been entered, your petitioner, in conformity to the practice in the State of West Virginia, presented a petition and assignment of errors, accompanied by a certified transcript of the record of said decree and the proceedings in said cause, to the Supreme Court of Appeals of said State, that being the highest court in said State, praying for an appeal from and supersedeas to the said decree of the Circuit Court of Kanawha County, which said appeal and supersedeas were denied by said Supreme Court of Appeals by an order entered on the fourteenth day of May, 1913; as

474 errors and a copy of the order of said Supreme Court of Appeals denying the prayer thereof, which said copies are duly certified under the seal of said Supreme Court of Appeals and attached hereto as a part hereof;

That the decree aforesaid of the Circuit Court of Kanawha County, West Virginia, has become, and is, the judgment of the highest court in said State in which said cause could be heard and determined, and the record of said judgment and of the proceedings in said cause is still in said Circuit Court;

That said final judgment or decree of the Circuit Court of Kanawha County was entered in a suit wherein was drawn in question the validity of Chapter 41 of the Acts of 1907 of the Legislature of the State of West Virginia, on the ground that said State statute is repugnant to Article 14 of the Amendments to the Constitution of the United States, and said judgment or decree is in favor of the validity of said statute; and also directly involves the constitutionality of the said Act of the State of West Virginia, because the same interferes with and imposes burdens and restrictions upon the interstate commerce transacted by this petitioner, and that the said judgment or decree of the Circuit Court of Kanawha County

therein is against the constitutional right claimed by this petitioner, and is contrary to the Constitution of the United States; all of which will more fully appear in detail from the assignment of errors presented herewith and filed herein.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Circuit Court of Kanawha County, West Virginia, to the end that
475 the record in said matter may be removed into the Supreme Court of the United States and the error complained of by your petitioner may be examined and corrected and said judgment or decree reversed. And your petitioner will ever pray, etc.

THEODORE W. REATH,
JOHN H. HOLT,
JOS. I. DORAN,
*Attorneys for the Norfolk and Western
Railway, Petitioner.*

476 STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, May 14, 1913, the following order was made and entered to-wit:

NORFOLK & WESTERN RAILWAY COMPANY

vs.

WM. G. CONLEY, Attorney General, et als.

This day came Norfolk & Western Railway Company, a corporation, by Jos. I. Doran, Theodore W. Reath, Lucien H. Cocke and Holt, Duncan & Holt, its attorneys, and presented to the Court a petition praying for an appeal from and supersedeas to a decree of the Circuit Court of Kanawha County, pronounced on the 15th day of March, 1913, in a cause in which said petitioner was plaintiff, and Wm. G. Conley, Attorney General, and others were defendants, with a transcript of the record of the decree aforesaid accompanying the petition, which being seen and inspected by the Court, the appeal and supersedeas prayed for is refused.

The petition referred to in the foregoing order is in words and figures, as follows, to-wit:

477 In the Supreme Court of Appeals of West Virginia,
Charleston.

No. —.

NORFOLK & WESTERN RAILWAY COMPANY, a Corporation, Plaintiff
Below, Appellant,

vs.

WILLIAM G. CONLEY, Attorney General, et al., Defendants Below,
Appellees.

Petition.

To the Honorable the Judges of the Supreme Court of Appeals of
the State of West Virginia:

Your petitioner, the Norfolk & Western Railway Company, would respectfully represent that it is aggrieved by a final decree entered by the Circuit Court of Kanawha County, West Virginia, on the fifteenth day of March, 1913, in a certain cause in equity then therein pending, wherein your petitioner was plaintiff, and W. G. Conley, Attorney General of the State of West Virginia, et al., were defendants.

478 A duly certified transcript of the record and proceedings
in said cause is herewith presented as a part hereof, from
which the following matters and things appear:

Statement of Case.

On the fourteenth day of August, 1909, your petitioner, the Norfolk & Western Railway Company, as plaintiff, instituted its suit in chancery in the Circuit Court of Kanawha County, West Virginia, the County wherein the seat of government of said State is located, against W. G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwick, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, all of which Counties are situated in the State of West Virginia, having for its object the procurement of an injunction against said defendants, and each of them, enjoining, inhibiting and restraining them, and each of them, from instituting or bringing, or causing to be instituted or brought, any action, suit, prosecution or other proceeding against the plaintiff, or any of its officers, agents or employes, to recover any fine, penalty or damages occurring or accruing under or imposed by an Act of the Legislature of the State of West Virginia, entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the Violation thereof," passed on the 20th day of February, 1907, approved by the Governor

of said State on the 24th day of February, 1907, and taking effect ninety days from its passage, being chapter 41 of the Acts of 1907.

479 & 480 Process was duly served upon all the defendants, and the bill of the plaintiff filed, wherein, among other things it was alleged that the plaintiff, your petitioner, was, and had been for some years past, the owner and operator of a system of railroads in the States of Virginia, West Virginia, North Carolina, Kentucky, Ohio and Maryland, with an aggregate mileage, main line and branches, of 1919.59 miles, and that of this mileage, main line and branches, 444.70 miles were located in the State of West Virginia, and distributed variously through the Counties of Jefferson, Wayne, Mingo, McDowell and Mercer in said State;

That the Legislature of the State of West Virginia passed an Act on February 20, 1907, approved by the Governor February 24th of that year, and to take effect ninety days from its passage, entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the Violation thereof," which said Act is Chapter 41 of the Acts of the Legislature of West Virginia, regular and extra sessions for the year 1907;

That said Act sought to limit the passenger fares of the plaintiff (your petitioner) to two cents per mile, by providing, among other things, "that all railroad corporations organized or doing business in this State under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile", and by further providing that "any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this Act shall be fined for each offense not less than fifty dollars, nor more than five hundred
481 dollars; provided that nothing contained in this Act shall apply to electric lines and street railways owned or operated in this State";

That, at the date of the passage of said Act, as well as at the time it went into effect, the property of the plaintiff in the State of West Virginia was valued and assessed for taxation by the Board of Public Works of said State at \$31,000,051.45, and that, at the time of the passage of said Act, and for a long time prior thereto, the plaintiff charged for the transportation of persons within the State of West Virginia a rate per mile not to exceed that prescribed by Sections 2472 and 2473 of the Code of West Virginia of 1906, which passenger rate so charged by it was reasonable, just and lawful, and approximated a rate per mile of 2.94 cents, and enabled the plaintiff to earn gross during the fiscal year ending June 30, 1907, from the transportation of intra-state passengers within the State of West Virginia the sum of \$362,997.74; that the total gross earnings during said period within the State, including the earnings for the transportation of passengers, as aforesaid, amounted to \$8,090,082.56, and that the total capital of the plaintiff according to said

valuation and assessment, apportioned on the basis of the gross earnings aforesaid between the earnings from the transportation of intra-state passengers within the State and the earnings from all sources within the State, would show the investment of the plaintiff within the State for the fiscal year ending June 30, 1907, and properly be allotted to the transportation of intra-state passengers therein, to have been \$1,391,902.31;

That it reasonably cost, with proper and economical management, to earn the said sum of \$362,997.74 (the gross earnings during the fiscal year ending June 30, 1907, from intra-state passengers within the State of West Virginia) eighty-five cents on each dollar
482 thereof, and that the return to the plaintiff during said year from its capital embarked and allotted to the business of transporting intra-state passengers in the State of West Virginia (\$1,391,902.31) was at the rate of 3.7% per annum;

That, immediately upon the going into effect of the Act aforesaid; that is to say, upon the 21st day of May, 1907, the plaintiff, in obedience to said Act, established a two cent passenger rate within the State of West Virginia, and observed, and continued to observe, up to the time of the institution of this suit, all the provisions and requirements of said Act, with the following result; that is to say, during the fiscal year immediately following the date when the Act went into effect; that is to say, from the first day of July, 1907, to the first day of July, 1908, the gross earnings derived from the transportation of intrastate passengers within the State of West Virginia amounted to only \$289,943.22, as against the \$362,997.74 of the year before, and the necessary expense incident to the earning of said \$289,943.22 was approximately 95% thereof; or, to put it another way, it cost about ninety-five cents to earn each dollar of said amount; and, treating the capital invested within the State and allotted to the transportation of intra-state passengers therein as being the same for the year 1908 that it was for the year 1907; that is to say, \$1,391,902.31, the net earnings for the fiscal year ending June 30, 1908, derived from the transportation of intra-state passengers within the State of West Virginia approximated 1.04 per cent. per annum on said capital so allotted;

That, for the fiscal year ending June 30, 1909, the gross earnings under the two cent rate amounted to only \$277,557.05, and that the expense necessarily incident to the earning of said amount was approximately 98.19 per cent. thereof, or, in other words, that
483 it cost about 98.19 cents to earn each dollar of said amount, with the result that, treating the capital invested in the State and allotted to intra-state passenger service as being the same that it was in the year preceding, made a net income to the plaintiff of approximately .38 of one per cent. per annum upon the capital therein invested and so allotted.

In other words, for the fiscal year ending June 30, 1907, the year immediately preceding the passage of the two cent rate statute by the West Virginia Legislature, and the installation by the plaintiff of the two cent rate thereunder, the plaintiff (when a charge of approximately 2.94 cents per mile was made for the carriage of intra-

state passengers) earned 3.7 per cent, per annum upon the capital invested on account of and charged to intra-state passenger service within the State of West Virginia; while, for the fiscal year next following the installation of the two cent rate; that is to say, the fiscal year ending June 30, 1908, the net per cent. per annum earned upon the capital invested in the State of West Virginia and allotted to intra-state passenger service only amounted to 1.04 per cent., and, for the fiscal year next following; that is to say, the year ending June 30, 1909, the net earnings upon said capital under said rate amounted to only .38 of one per cent.

The bill further charged that these diminished revenues resulted from the two cent rate, notwithstanding an honest, intelligent and economical management by the plaintiff of its railway properties, and that the effect of said legislative enactment had been, and is, to reduce the rates and revenues of the plaintiff, and decrease its earnings from intra-state passenger business in the State of West Virginia below what would be a reasonable compensation for the services rendered, and has been, and is, operating a confiscation of its

484 property, in violation of the law of the land;

That said Act has deprived, and is depriving, the plaintiff (your petitioner) of the rights guaranteed unto it by Section 9 of Article 3 of the Constitution of West Virginia, which provides that "private property shall not be taken or damaged for public use without just compensation", and also of the rights guaranteed to it by Sec. 10 of Article 3 of the Constitution of said State, which provides that "no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers";

Further that the penalties prescribed by the second section of said Act are so enormous as to prevent the plaintiff (your petitioner) from securing any judicial inquiry into the validity of the Act, and that its penal provisions were enacted for the purpose of so burdening any challenge of the Act in the Courts that the plaintiff would be compelled to submit, as has been the case, to the confiscation worked by said Act, and that the effect of said penalties is to deprive the plaintiff of the equal protection of the law, and constitutes a denial to the plaintiff of due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws";

That said Act of the Legislature is also void as arbitrarily and artificially classifying railroads, such as the road of this plaintiff, fifty miles in length and over in one class, and subjecting them to the burdens and penalties of the Act, while exempting from such burdens and penalties all railroads under fifty miles in length.

485 The bill further alleges that, in the absence of the relief prayed in the bill, the work of confiscating the property of the plaintiff will continue, or the number of actions or penalties to which the plaintiff would be exposed will be enormous, subjecting

it to a multiplicity of indictments, suits and prosecutions for penalties, to its irreparable injury.

It was finally alleged in said bill that the defendant W. G. Conley, Attorney General of the State of West Virginia, and the other defendants, being the Prosecuting Attornies of the various Counties through which the line of the road of the plaintiff goes, are the officers charged under the Constitution and laws of the State of West Virginia with the institution and conduct of all prosecutions such as are provided for in the Act of 1907 complained of, and that they, and each of them, within their respective spheres, intend to, and will, enforce the provisions of said Act of 1907 against the plaintiff, unless they, and each of them, be enjoined from so doing. The bill thereupon prays for an injunction, as hereinbefore stated, against each of the defendants, enjoining, inhibiting and restraining them, and each of them, from proceeding against this plaintiff in any particular under said Act against which complaint is made.

To this bill, the defendant W. G. Conley, Attorney General, made a special appearance, and moved the Court to dismiss the same, for reasons set forth in writing, and, at the same time, demurred thereto; but his said motion and demurrer were overruled, and, after argument of counsel, a temporary injunction was granted by the Court against the Attorney General and the various Prosecuting Attornies, and each of them, restraining and inhibiting them, and each
486 of them, from any and all prosecutions and proceedings of any nature whatsoever against the plaintiff on account of said Act.

The decree granting the injunction further provided that, in the event the plaintiff should put into effect upon its line or lines any rate or rates for the transportation of intra-state passengers within the State of West Virginia exceeding the rate named in the Act complained of, the plaintiff should give to any person traveling between points on its line in the State of West Virginia at a rate exceeding two cents a mile a coupon or coupons, showing the excess amount paid over and above the two cent rate, which coupon or coupons it was ordered, in the event the litigation should finally be determined against the plaintiff, should be redeemed, upon the delivery of the same, by the payment or return to the holder thereof of the excess charge.

On the thirtieth day of July, 1910, the defendants filed their joint and separate answer to the bill, wherein they admitted that they were the officials described in the bill as defendants, and admitted the passage of the Act by the Legislature of the State of West Virginia complained of, as well as the observance of its provisions by the plaintiff from the time it went into effect until the institution of the present suit. They further admitted that, at the time said Act took effect; that is to say, on the 21st day of May, 1907, the property of the plaintiff located in the State of West Virginia was valued and assessed by the Board of Public Works of that State at the sum of \$31,000,051.45, and that, under the law as it then stood in West Virginia, by virtue of the provisions of Sections 2472 and 2473 of the Code of said State of 1906, the plaintiff had a right to

charge for passenger fares within the State more than two cents per mile; but denied that said rate was reasonable or just.

They further admitted that it might be true, as alleged in the bill, that the gross earnings of the plaintiff during the fiscal year ending June 30, 1907, from the transportation of intra-state passengers within the State were \$362,997.74, and that the total gross earnings of the plaintiff from all sources within the State during said year, while the three cent passenger law was in effect, were \$8,090,082.56, as well as the fact that the total capital of the plaintiff, as valued and assessed in the State of West Virginia to be allotted to the transportation of intra-state passengers within said State was \$1,391,902.31, "if apportioned on the basis of the gross earnings as aforesaid between the earnings from the transportation of intra-state passengers within said State and the earnings from all sources therein"; but denied that this was the proper method of apportioning the same, and denied that it reasonably cost the plaintiff eighty-five cents to earn each dollar earned by it in the transportation of intra-state passengers within said State during the fiscal year ending June 30, 1907, and that the return to the plaintiff thereon was only 3.7 per cent. per annum; but asserted that, on the contrary, the net return to the plaintiff on its capital invested in West Virginia in its intra-state passenger business during said year was largely in excess of six per cent. per annum, after the payment of all taxes and other expenses.

They also denied that the application of the Act of the Legislature complained of reduced the plaintiff's earnings upon intra-state passenger service within the State of West Virginia for the year ending

June 30, 1908, to approximately 1.04 per cent. per annum on the amount of the plaintiff's capital invested in said State, and allotted to such passenger service. They also denied, upon information and belief, that the gross earnings derived by the plaintiff from the transportation of intra-state passengers within the State of West Virginia for the year ending June 30, 1908, amounted to only \$289,943.22, and asserted that said earnings were largely in excess of that amount; and denied that the expense necessarily incident to the earning of that sum was approximately ninety-five per centum thereof; but charged that the necessary expense was much less than that amount, and that the net profits arising from said service during said year within said State was largely in excess of six per cent. per annum on the capital or value of the property used and devoted to that purpose.

They likewise denied the allegations of the bill in respect in the gross earnings on intra-state passengers within the State of West Virginia for the year 1909, the expense in earning the same, as well as the fact that the net profit derived therefrom was approximately .38 of one per cent. on the plaintiff's capital invested in said State, and allotted to such service, and charged that said net profits for said year (1909) on the property of the plaintiff so invested, after the payment of taxes and all expenses etc., was largely in excess of six per cent.

The defendant further by their answer, and specifically, denied the right of the plaintiff, in determining the question of confiscation, to segregate its passenger earnings from its other earnings. The language of the answer upon this subject is as follows:

"But these respondents deny the legal or equitable right of
489 the plaintiff to segregate the passenger earnings from the other earnings of the plaintiff in determining whether said two cent passenger law operates as a confiscation of its property, and they aver that the entire earnings of the plaintiff from all sources should be considered in connection therewith."

They also denied that the penalties of the Act complained of were intended to burden or hinder the challenge by the plaintiff of the legality of said Act; that said Act violates either Sec. 9 of Article 3 of the Constitution of the State of West Virginia, or Sec. 10 of said Article of said Constitution, and denied that the operation of the Act complained of results in the reduction of the plaintiff's revenues to the extent that it works a confiscation of its property, in violation of the Fourteenth Amendment to the Constitution of the United States.

A general replication was entered by the plaintiff to this answer, and, thereupon, depositions were taken, both for the plaintiff and for the defendants. The witnesses were not numerous, but their depositions were long, and involved many and complicated exhibits. Upon behalf of the plaintiff, the deposition of Joseph W. Coxe, its Comptroller, was taken, whereby it was shown that the receipts of the plaintiff from its intra-state passenger traffic within the State of West Virginia during the fiscal years ending June 30, 1908, and June 30, 1909 (the period during which the two cent passenger rate was put into force prior to the granting of the injunction herein), fell far below a reasonable and just return for the service rendered, amounting to less than two per cent. in the first year, and less than

one per cent. in the second of said years upon the capital of
490 the plaintiff invested in said State, and allotted, as alleged in the bill, to its intra-state passenger service in said State.

In support of the answer, the defendants took the deposition of Mr. Hillman, an experienced railroad man, and an expert accountant, who, by a series of calculations, made and exhibits filed, undertook to show that the rate was not confiscatory in fact, but that the revenues of the road, when considered as a whole, notwithstanding the two cent passenger rate complained of, were reasonably remunerative. He admitted, however, that it cost the Norfolk & Western Railway Company ninety-seven and a fraction cents to earn each dollar received by it under the two cent passenger rate for the transportation of intra-state passengers within the State of West Virginia, and stated, after an examination of the books and accounts of the plaintiff and an analysis of its operating and other expenses and its earnings, that the two cent rate was not remunerative to the Norfolk & Western. This was the defendants' own witness, and, upon cross-examination, his exact language was:

"I should say that the percentage left after the payment of the operating expenses and taxes is, in my judgment, an inadequate

return for the capital employed in the passenger business". (Answer to Q. 2, page 77 of Hillman's deposition, Record page 388.)

And again the following question was propounded to him, and he made the following answer thereto:

"Q. 9. When you have heretofore testified that 97.4203 per cent. of the passenger earnings were consumed in paying the passenger expenses, you have included in those earnings not only the earnings derived from intra-state passenger fares, but also the earnings derived from the mail and express business of the company, and extra baggage?"

A. Yes, sir; and also some other slight passenger receipts."

(Hillman's deposition, pages 81-2; Record, pages 392-3.)

After the conclusion of the testimony, the cause was argued, and the final decree hereinbefore complained of was entered on the fifteenth day of March, 1913, whereby the Court found that Chapter 41 of the Acts of the West Virginia Legislature for the year 1907 is constitutional upon its face, and that the two cent passenger rate thereby imposed is not confiscatory in fact as to the plaintiff, the Norfolk & Western Railway Company; and, upon such finding, dissolved the preliminary injunction granted against the defendants on the 28th day of August, 1909, and adjudged, ordered and decreed that the plaintiff, upon presentation, receive, redeem and pay to the respective parties holding the same, all coupons issued by it under the order of the Court entered on the 28th day of August, 1909.

Your petitioner further represents that said decree is erroneous, and, as errors therein, assigns the following:

Assignments of Error.

I. The Court erred in holding that Chapter 41 of the Acts of the West Virginia Legislature of 1907 did not, and does not, deprive the plaintiff of the rights, privileges and immunities guaranteed to it by Section 9 of Article 3 of the Constitution of West Virginia, which provides that "private property shall not be taken or damaged for public use without just compensation."

II. The Court erred in holding that Chapter 41 of the Acts of the West Virginia Legislature of 1907 did not, and does not, deprive the plaintiff of the rights, privileges and immunities guaranteed to it by Section 10 of Article 3 of the Constitution of West Virginia, which provides that "no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers."

III. The Court erred in holding that Chapter 41 of the Acts of West Virginia of 1907 does not, in violation of the Fourteenth Amendment to the Constitution of the United States, arbitrarily and artificially classify railroads within the State of West Virginia by applying its provisions to railroads, like the plaintiff's, fifty miles in length and over, while exempting from the burdens and penalties of such provisions all railroads under fifty miles in length.

IV. The Court erred in holding that Chapter 41 of the Acts of the West Virginia Legislature for the year 1907 was not intended by the severity of its penalties, and does not by said penalties, deprive the plaintiff of its property "without due process of law," or deny the plaintiff "the equal protection of the laws," in violation of Section One of Article 14 of the Amendments to the Constitution of the United States.

V. The Court erred in holding as a fact, contrary to the undisputed evidence in this case, that the enforcement of the intra-state passenger rate of two cents per mile within the State of West Virginia, in accordance with the provisions of Chapter 41 of the Acts of the Legislature of the State of West Virginia for the year 1907, did, for the fiscal years ending June 30, 1908, and June 30, 1909, respectively, and does, produce a just and reasonable return to the plaintiff, the Norfolk & Western Railway Company, for the service rendered by it in such passenger traffic, and was not, and is not, confiscatory of the plaintiff's property, in violation of Section I of the Fourteenth Amendment to the Federal Constitution.

VI. The Court erred in holding by said decree that, in determining whether or not the two cent intrastate passenger rate applied to the Norfolk & Western Railway Company within the State of West Virginia by the provisions of Chapter 41 of the Acts of the Legislature of said State for the year 1907 was and is confiscatory, the intrastate passenger rates of said company could not be segregated from its other earnings, but that such question must be determined upon the consideration of all the earnings of said Railway Company, and that its intrastate passenger rates could be reduced to such a minimum as to impose a burden upon its interstate passenger and freight service.

VII. Said decree is in other respects irregular, unjust and erroneous.

Your petitioner, therefore, prays for an appeal from and supersedeas to said decree of March 15, 1913, in order that the same before you may be caused to come, to the end that the same may be reviewed and reversed, and such orders entered in this Court as the Circuit Court of Kanawha County should have entered therein.

NORFOLK & WESTERN RAILWAY
COMPANY, *By Counsel.*

JOSEPH I. DORAN,
THEODORE W. REATH,
LUCIEN H. COCKE,
HOLT, DUNCAN & HOLT,

Counsel.

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Certificate of Counsel.

I, John H. Holt, an Attorney practicing in the Supreme Court of Appeals of the State of West Virginia, do hereby certify that, in my opinion, the decree complained of in the foregoing petition is erroneous, and should be reviewed and reversed by this Honorable Court.

Given under my hand this eighth day of May, 1913.

JOHN H. HOLT.

495 STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, Wednesday, May 14, 1913, the following order was made and entered, to-wit:

This day came Norfolk & Western Railway Company, a corporation, by Jos. I. Doran, Theodore W. Reath, Lucien H. Cocke and Holt, Duncan and Holt, its attorneys, and presented to the Court a petition praying for an appeal from and supersedeas to a decree of the Circuit Court of Kanawha County, pronounced on the 15th day of March, 1913, in a cause in which said petitioner was plaintiff, and Wm. G. Conley, Attorney General, and others were defendants, with a transcript of the record of the decree aforesaid accompanying the petition, which being seen and inspected by the Court, the appeal and supersedeas prayed for is refused.

A true copy.

Attest:

WM. B. MATHEWS, *Clerk.*

496 STATE OF WEST VIRGINIA, *To-wit:*

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of said State, do hereby certify that the foregoing is a true, correct and complete transcript of the proceedings upon an application to said Court for an appeal and supersedeas in the cause of Norfolk & Western Railway Company, a corporation, vs. William G. Conley, Attorney General, et al., lately pending in the Circuit Court of Kanawha County, together with a true and correct copy of the petition praying for such appeal and supersedeas, as fully as the same appears of record and on file in my said office.

Given under my hand and official seal of the said Court, at Charleston, this 28th day of May, 1913, and in the fiftieth year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
*Clerk of the Supreme Court of Appeals
of the State of West Virginia.*

497 In the Supreme Court of the United States, October Term, 1912. No. —.

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

W. G. CONLEY, Attorney General of the State of West Virginia, et al.,
Defendants in Error.

And now, before the Justices of the Supreme Court of the United States of America, at the Capitol, in the City of Washington, comes the Norfolk and Western Railway Company, Plaintiff in Error, by its counsel, in the above stated case, and assigning error therein,
says:

That in the record and proceeding in the aforesaid cause there is manifest error in this, to-wit:

1. The Court erred in holding that Chapter 41 of the Acts of the West Virginia Legislature for the year 1907 was not intended by the severity of its penalties, and does not by said penalties, deprive the plaintiff of its property "without due process of law," or deny the plaintiff "the equal protection of the laws," in violation of Section One of Article 14 of the Amendments to the Constitution of the United States.

2. The Court erred in holding that the enforcement of the intra-state passenger rate of two cents per mile within the State of West Virginia, in accordance with the provisions of Chapter 41 of the Acts of the Legislature of the State of West Virginia for the year 1907, did, for the fiscal years ending June 30, 1908, and June 30, 1909, respectively, and does, produce a just and reasonable return to the plaintiff, the Norfolk and Western Railway Company, 498 for the service rendered by it in such passenger traffic, and was not, and is not, confiscatory of the plaintiff's property, in violation of section one of the Fourteenth Amendment to the Federal Constitution.

3. The Court erred in holding that the intra-state passenger earnings of the Norfolk & Western Railway Company within the State of West Virginia, under the two cent passenger rate imposed by Chapter 41 of the Acts of 1907 of the Legislature of said State, could not be segregated from the other earnings of said Company in determining whether or not the provisions of said Act are confiscatory, and erred in holding that said Act was not confiscatory because the entire earnings of the road produced a reasonable return upon its capital invested, although the return from intra-state passenger service, considered alone, was not and is not remunerative; all of which was and is in violation of subdivision 3 of Section VIII of Article I of the Constitution of the United States.

Wherefore, the said Norfolk and Western Railway Company prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of the said judgment and decision.

THEODORE W. REATH,
JOHN H. HOLT,
JOS. I. DORAN,
Attorneys for Plaintiff in Error.

499 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Circuit Court of Kanawha County, State of West Virginia, Greeting:

[Seal of the Supreme Court of the United States]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, being the highest court of law or equity of

the said State in which a decision could be had in the said suit between Norfolk & Western Railway Company, plaintiff, and W. G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwick, Prosecuting Attorney of the County of Wayne, S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or

500 statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff, Norfolk & Western Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourth day of June, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

EDWARD D. WHITE,

Chief Justice of the United States.

501 UNITED STATES OF AMERICA, ss:

To W. G. Conley, Attorney General of the State of West Virginia; George D. Moore, Prosecuting Attorney of the County of Jefferson; D. B. Hardwick, Prosecuting Attorney of the County of Wayne; S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo; Robert R. Smith, Prosecuting Attorney of the County of McDowell, and John R. Pendleton, Prosecuting Attorney of the County of Mercer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Kanawha County, State of West Virginia, wherein Norfolk & Western Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this fourth day of June, in the year of our Lord one thousand nine hundred and thirteen.

EDWARD D. WHITE,
Chief Justice of the United States.

502 Office of the Attorney General of West Virginia.

CHARLESTON, WEST VIRGINIA.

I, A. A. Lilly, Attorney General for the State of West Virginia, do hereby accept service of the within citation for each and all of the defendants named therein.

Given under my hand this 9th day of June, 1913.

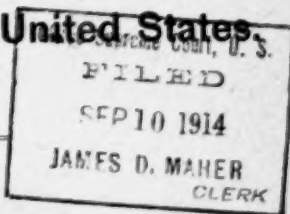
A. A. LILLY,
*Attorney General of West Virginia,
and Attorney for Defendants.*

Endorsed on cover: File No. 23,751. West Virginia, Kanawha County Circuit Court. Term No. 600. Norfolk & Western Railway Company, plaintiff in error, vs. W. G. Conley, Attorney General of the State of West Virginia, et al. Filed June 14th, 1913. File No. 23,751.

No. 197.

OCTOBER TERM, 1914.

Supreme Court of the United States



NORFOLK AND WESTERN RAILWAY COMPANY,
Complainant in Error,

vs.

**W. G. CONLEY, Attorney General of the State of West
Virginia, et al., Defendants in Error.**

**BRIEF ON BEHALF OF THE NORFOLK AND WESTERN
RAILWAY COMPANY.**

**JOSEPH I. DORAN,
THEODORE W. REATH,
JOHN H. HOLT,
LUCIEN H. COCKE,**

*Of Counsel for Norfolk and Western
Railway Company.*

OCTOBER, 1914.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 197.

*Norfolk and Western Railway Company, Com-
plainant in Error.*

VS.

*W. G. Conley, Attorney General of the State of
West Virginia, et als., Defendants in Error.*

BRIEF ON BEHALF OF THE NORFOLK AND WESTERN RAILWAY COMPANY.

STATEMENT OF CASE.

The Norfolk and Western Railway Company operates lines of railroad extending through and serving portions of the States of Virginia, West Virginia, Maryland, North Carolina and Ohio with

a total mileage 1919.5 and in West Virginia 444.7 miles (Record, page 5).

Prior to 1906, the standard maximum rate of passenger fares over its road was 3 cents per mile (Record, page 5). About that time, action was taken by the legislatures or commission of the States of Virginia, West Virginia and Ohio reducing the intrastate rate to 2 cents per mile, and in the State of North Carolina the rate was made $2\frac{1}{4}$ cents per mile. The rates so established were deemed by the company to be confiscatory.

In Virginia, relief was sought by the various railway companies, the plaintiff here included, in the Federal Court, culminating in the test case of *Prentis vs. Atlantic Coast Line Company*, 211 U. S., 210. Thereafter the Norfolk and Western Railway Company filed a petition with the State Corporation Commission of Virginia asking for a re-hearing of its order establishing a 2 cent rate; and, upon this re-hearing, the Commission decided that the 2-cent passenger rate was unjust, and established a rate of $2\frac{1}{2}$ cents (Annual Report State Corporation Commission of Virginia of 1909, page 28.)

The rate in North Carolina had been established by the Legislature of 1907 at $2\frac{1}{4}$ cents; and, after controversy, the Governor convened the Legislature in special session for the purpose of reconsidering the subject; and thereupon the extra ses-

sion of 1908 established a rate of 2½ cents (Acts of North Carolina, 1908, page 154).

The validity of the 2 cent rate in Ohio has not yet been litigated by this Company.

Describing (*inter alia*) the Ohio status, Harlan, Chairman, in The Five Per Cent Case, 31 I. C. C., 351 (July 29, 1914), said at pages 407-8:

“The need of additional revenues is greatest in central freight association territory, and existing statutes in Ohio, Indiana, Illinois, and Michigan may be obstacles to the raising of passenger fares in those states. But we are confident that if these statutory fares are clearly shown to be unduly burdensome to the carriers, the people of those great states will cheerfully acquiesce, as the people of New England have done, in reasonable increases, and that the necessary legislative authority will be promptly given. The traveling public is giving expression to its demand for better service, better accommodations, and for the adoption by carriers of all the devices that make for safety. A public that demands such a service can not reasonably object to the payment of a reasonable compensation therefor.

The railroads in central freight association territory have, in the main, failed to separate passenger and freight operating expenses. The existence of the 2-cent laws may be due, in large part, to that fact. An accu-

rate ascertainment and frank disclosure of operating costs is the most effective protection against the possibility of unjust legislation, for we must assume that the public intends no injustice against the owners of these great properties that are devoted to the service of the public. The separation of freight and passenger expenses was recently discussed in *Separation of Operating Expenses*, 30 I. C. C., 676."

It thus appears that the standard rate of this Company at this time on its principal mileage is $2\frac{1}{2}$ cents per mile, instead of 3 cents, which was the standard prior to 1906. This is the result of discussions, investigations, concessions and litigation, and this Company, in regard to its passenger rates, is in accord with the views of the public authorities of the States in which it operates, except the State of West Virginia.

On February 20th, 1907, the Legislature of West Virginia imposed a 2 cent passenger rate upon roads over fifty miles in length. A copy of the Act is printed as an appendix to this brief. This law became effective on the 21st May, 1907, and was observed by this Company for two fiscal years. The result of this test demonstrated that the Company should apply to the courts for relief, and a bill was then filed in the Circuit Court of Kanawha County, showing the actual result

of the operation of the 2 cent rate upon the revenues of the Company and the inadequate return upon capital invested in the plant necessary to perform this public service. The Act was challenged as confiscatory in violation of the Fourteenth Amendment (Record, page 22). The prayer of the bill was for an injunction restraining the enforcement of the law by the State and county officials charged therewith.

Upon the presentation of the bill to the Court the Attorney General of the State and the prosecuting attorneys of the various counties through which the road of the complainant runs, being the defendants in the cause, appeared specially and moved the Court to deny the application and dismiss the bill, on the ground that it was a suit against the State, which motion was argued and overruled. Thereupon, the defendants demurred to the bill, which demurrer was argued and likewise overruled, and a preliminary injunction was granted as prayed. Subsequently, the defendants filed their joint and several answer, upon which issue was joined and testimony was taken upon the issue of confiscation. In the meantime, that is to say, between the time of the filing of the bill herein and the time of the filing of the answer of the defendants, the similar case of the Coal & Coke Railway Company *vs.* Conley Attorney General, *et al.*, (67 W. Va.

Rep., page 129, had been decided by the Supreme Court of Appeals of West Virginia, and the Act here in question had been held to be constitutional upon its face, but unconstitutional as to the Coal & Coke Railway Company because confiscatory in fact; and, in consequence of this ruling, the contention in this case was thereafter confined to the question of confiscation in fact. In this respect, it differs from the case of the Chesapeake & Ohio Railway Company *vs.* Conley *et al.*, recently decided by this Court (230 U. S., 513), which only involved the constitutionality of the Act upon its face. No attempt was made to prove confiscation in that case.

Upon the completion of the testimony, the case at bar was argued and submitted and a decree entered dissolving the injunction (Record, page 246). Application was made for an appeal to the Supreme Court of Appeals of the State, but was refused, and thereupon a writ of error was sued out in this Court to the Circuit Court of Kanawha County, West Virginia, based upon the assignments of error hereinafter set out.

The evidence for the Company was that of Joseph W. Coxe, the Comptroller of the Company, familiar with its accounts and having charge thereof. The evidence for the defendants was that of C. W. Hillman, an accountant with experience

in railroad matters who had made a specialty of ascertaining cost in railway rate cases (Record, page 179-180). Under the laws of West Virginia, all railroad property within the State is assessed for taxation by the Board of Public Works at its "true and actual value" (W. Va. Code 1906, Sec. 696), and, in consequence, the plaintiff's witness herein accepted the valuation of the plaintiff's property by the State for taxation as the total capital employed by it in the State for all classes of business. This valuation was \$31,000,051.45, and, appropriating this capital on the percentage of the gross earnings of the several classes of business, the witness arrived at the result that, for the fiscal year ending 1908, the return on intrastate passenger business in West Virginia was 1.04%, and, for the fiscal year 1909, 38/100 of 1%; these being the two years of the test of the 2 cent rate above described.

The defendants' witness, Mr. Hillman, made no distribution or allocation of capital, but had made an investigation of the books and records of the Railway Company in order to testify (Record, page 181), and he explained (Record, page 183 and the following pages) the basis upon which he made a division of operating expenses—see Exhibit C. W. H. No. 2, Record between pages 244 and 245. From his testimony it appears that, after distributing about 65% of the expenses or cost which

could be accurately distributed to the passenger service on the one hand or to the freight service on the other, he distributed the remaining 35% of cost according to the use-units deemed most logical and appropriate by him, such as engine miles, passenger car miles, etc. (Record, page 215.) It should be noted here that the Norfolk and Western Railway Company has, since its organization in 1896, kept accounts whereby it separates the respective costs of doing its freight and passenger business by allocating to each the items of expense which have been incurred in doing that particular business and, as the result of this allocation from month to month (Record, page 29), it has been ascertained that about 65% of the cost of doing each class of business can be definitely allocated. Hence Mr. Hillman, in allocating the cost of doing the passenger business in West Virginia, had at hand the actual allocation made by the Railway Company as to 65% of such cost. The remainder he distributed between the two classes of business on the various use-units set forth in his testimony as above described.

Mr. Hillman's exhibits disclose in detail the method whereby he ascertained the actual cost incurred by this Company in earning the revenue from intrastate passenger business. His investigation is summarized in his Exhibit No. 6 (Record between pages 244 and 245), which shows that

the Company earned from intrastate passenger business \$62,123.25, and paid out in expenses, for the conduct of that business, \$58,007.87. The operating ratio was 93.3754%, and, adding the proper proportion of taxes, 4.0449%, the operating cost, including taxes, was 97.4203%. For each dollar earned, therefore, by the Company during the period under examination in the conduct of its intrastate West Virginia passenger business, the Company expended 97,4203 cents in paying the actual cost of operation and taxes. The remainder of each dollar of revenue, 2,5797 cents, would be all that would remain for fixed charges, dividends, improvements to plant betterments, etc. Mr. Hillman accordingly drew the conclusion from his investigation: (Record, page 215) that "the cost of carrying a passenger one mile in the State of West Virginia was very close to two cents per passenger per mile," and, upon cross-examination (Record, page 213), testified as follows:

"A. In regard to the question of the remuneration of the 2-cent rate in West Virginia, I would say that the rate is remunerative as regards the direct operating expenses and taxes chargeable against the 2-cent passenger receipts; that when we consider the plant that is necessary to operate the passenger business and the return upon that plant, the rate is not remunerative.

Q. 2. In other words, as I understand, the 2-cent rate about reimburses the Norfolk & Western Railway Company the actual cost incident to doing the service of conducting and carrying the passenger, but gives practically no return to the railroad company for the capital invested and the risks incident to the performance of the service?

A. I should say that the percentage left after the payment of the operating expenses and taxes is, in my judgment, an inadequate return for the capital employed in the passenger business."

It was unnecessary for Mr. Hillman to distribute capital, as his ascertainment of income and expense proved that there was no substantial return beyond expenses upon the intrastate passenger business of the Company in West Virginia. The expenses as he actually found them from the Company's books absorbed practically the whole of the operating revenue from that branch of the business.

Thus confiscation appears from the testimony if the intrastate passenger business of the Company be considered alone. But the State advances the contention (see XI of the answer, Record, page 19), that

"These respondents still further deny the legal or equitable right of the plaintiff to segregate its passenger business from that of its freight and other business, or to divide

any of its earnings from any source or sources, in determining the constitutionality of said Act, and they aver that the entire earnings from all sources should be considered in connection therewith."

The answer then draws the conclusion, that, as the total return upon *all* of the Company's business in West Virginia, freight and passenger, state and interstate, was not confiscatory, the bill could not be maintained. Mr. Hillman's testimony did not follow the bill but added together the intrastate passenger and freight earnings in West Virginia to prove a reasonable return; see Exhibit No. 7, Record between pages 244-5. The Circuit Court, as we have seen, dissolved the injunction (Record, page 246) on the ground "that the two-cent passenger rate" imposed by the West Virginia Act was "not confiscatory in fact as to the" Norfolk and Western Railway Company, this finding being, in view of the pleadings and evidence as above set forth, based upon the legal theory that the intrastate passenger business and earnings could not be segregated from the intrastate freight business of the Company in West Virginia for the purpose of determining confiscation.

It will be seen that the Comptroller for the Company and the expert for the defendants, although traveling in part by different routes, ar-

rived at the same result, viz.: that the revenues of the plaintiff derived *solely* from its West Virginia intrastate passenger service, based upon a two-cent rate, do not furnish a reasonable return upon the capital devoted to such service. The apportionment of capital made by the plaintiff's witness was based upon gross earnings, a method which, though not accurate, is sufficient if otherwise aided, and it is plain from his exhibits (Exhibit B-2, Exhibit C-2 and Exhibit D-2) that this is a case where the facts "show confiscation so convincingly in any event, after full allowance for possible errors in computation, as to make negligible questions arising from the use of particular methods,"—a case in which "errors attributable either to valuation or to apportionments cannot be regarded as sufficiently great to change the result." The expert for the State made no direct distribution of capital, but he did make an accurate distribution of cost between the passenger and freight business of the road so as to delimit in a comparative way the Company's total capital used for intrastate passenger service, and to show that the return from West Virginia intrastate passenger service is so completely eaten up by expense as to make the inquiry concerning the amount of capital embarked in the particular class of service immaterial.

And if the evidence of both parties unites, as in

the case at bar, to show inadequate earnings, the result is confiscation.

The question to which this brief will be addressed is one of law and the only question which arises upon the Record, namely;

May earnings from intrastate passenger business be segregated in order to determine confiscation?

ASSIGNMENTS OF ERROR.

Assignment of error No. 1 (Record, page 262) is hereby abandoned.

Assignment No. 2: The Court erred in holding that the enforcement of the intrastate passenger rate of two cents per mile within the State of West Virginia, in accordance with the provisions of Chapter 41 of the Acts of the Legislature of the State of West Virginia for the year 1907, did, for the fiscal years ending June 30, 1908, and June 30, 1909, respectively, and does, produce a just and reasonable return to the plaintiff, the Norfolk and Western Railway Company, for the service rendered by it in such passenger traffic, and was not, and is not confiscatory of the plaintiff's property in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution.

Assignment No. 3: The Court erred in holding that the intrastate passenger earnings of the Norfolk & Western Railway Company within the State of West Virginia, under the two cent passenger rate imposed by Chapter 41 of the Acts of 1907 of the Legislature of said State, could not be segregated from the other earnings of said Company in determining whether or not the provisions of said Act are confiscatory, and erred in holding that said Act was not confiscatory because the entire earnings of the road produced a reasonable return upon its capital invested, although to the return from intrastate passenger service, considered alone, was not and is not remunerative; all of which was and is in violation of subdivision 3 of Section VIII of Article I of the Constitution of United States.

BRIEF OF ARGUMENT.

The earnings from intrastate passenger business must be separated from all other earnings to determine whether the Act is confiscatory.

(Both assignments of error, 2 and 3, present the same error.)

The State has regulated the passenger rates intrastate separately by the Act under examina-

tion. The courts must make the same separation in determining whether the Act is confiscatory. The point was decided as between state and interstate rates in *Smyth vs. Ames*, 169 U. S., 466, wherein Mr. Justice Harlan, in holding the Nebraska freight rate law of 1893 unconstitutional as depriving railroads of property without due process, said:—

“In our judgment it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it.”

In *Railroad Company vs. Philadelphia*, 220 Penna. 100 (1908), the State had regulated intra-state passenger rates by an Act limiting such rates to a maximum of two cents a mile. Held that inquiry as to confiscation should be limited to the rates so regulated. The claim of the State was that intra-state passenger and intra-state freight revenues should be combined to determine confiscation. Mitchell, C. J., said:—

“It would be sufficient answer to say that the Legislature itself in the Act of 1907 has treated the passenger traffic as a separate and

independent subject of examination and regulation."

And later he said that carriers "should not be required to do any part of their business in an unbusinesslike way with a resulting loss;" and he added that "if part is unprofitable it is neither good business nor justice to make it more so because the loss can be offset by profit on the rest." And further he said: "The corporation is entitled to make a fair profit on every branch of its business subject to the limitation that its corporate duties must be performed even though at a loss."

If Governmental authority regulate a particular rate, then that rate may be separately examined and the courts will annul the Governmental regulation if unlawful. In *Southern Railway vs. St. Louis Hay & Grain Company*, 214 U. S., 297, the Interstate Commerce Commission had held that a reconsignment charge should cover only the expense to the carrier and exclude any profit; but this court in reversing the decision said, By Mr. Justice Brewer, writing the opinion (page 301):—

"If the stopping for inspection and re-loading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that

privilege. It is justified in receiving some compensation in addition thereto."

Down to the detail of a single rate or charge regulated by Government this court will give relief against confiscation. If Government, State or Federal, select a larger section or division of the carrier's business for regulation, then lawfulness may always be determined by considering that section separately from all the rest of the carrier's business.

In the recent decision (July 29, 1914) of *The Five Per Cent Advance of Freight Rates Case*, 31 I. C. C., 351, Harlan, Chairman, said at page 392:

"We know of no provision of law under which we should be justified in increasing freight rates to provide a return upon property used exclusively in the passenger service, much less to take care of losses incurred in such service. In our opinion each branch of the service should contribute its proper share of the cost of operation and of return upon the property devoted to the use of the public."

In *I. C. C. vs. U. P. R. Co.*, 222 U. S., 541, Mr. Justice Lamar, in upholding the validity of an order of the Interstate Commerce Commission reducing certain lumber rates of the defendant, said:

"Where the rates as a whole are under consideration, there is a possibility of deciding,

with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate."

In the Consolidated Gas case from New York (212 U. S., 19), this Court declared that a Gas Company having a monopoly was "entitled to 6% on the fair value of its property devoted to the public use."

In addition to reasonable return upon investment the railway is also entitled to sufficient income to provide for obsolescence of its property. This court said in *Knoxville vs. Knoxville Water Company*, 212 U. S. 1:—

"Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement.

It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning."

In the case at bar confiscation is proven and admitted by the State if, as the cases show must be done, the intrastate passenger business is considered separately. The decree should be reversed.

JOSEPH I. DORAN,
THEODORE W. REATH,
JOHN H. HOLT,
LUCIEN H. COCKE,

*Of Counsel for Norfolk and Western
Railway Company.*

OCTOBER, 1914.

APPENDIX.

ACTS OF WEST VIRGINIA—1907. REGULAR AND
EXTRA SESSIONS PAGES 226-27. CHAPTER 41.

(Senate Bill No. 15.)

AN ACT relating to and regulating passenger rates upon railroads in the state of West Virginia, and prescribing penalties for the violation thereof.

(Passed February 20, 1907. In effect ninety days from passage. Approved by the Governor, February 24, 1907.)

Be it Enacted by the Legislature of West Virginia:

SEC. 1. That all railroad corporations, organized or doing business in this state under the laws or authority thereof shall be limited in their charges for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, to the sum of two cents per mile, or fractional part of a mile, but the fare shall always be made the multiple of five nearest reached by multiplying the rate by the distance, and if for any one passenger the rates herein provided shall be less than five cents, the said sum of five cents many be charged as a minimum; children under twelve years of age shall be carried for one-half fare above prescribed; *provided*, that any passenger boarding a train at a station where tickets are sold, without having procured a ticket, may be charged an additional fare of ten cents, for which sum a rebate slip, redeemable in money, upon presentation to any ticket agent of the company,

shall be issued and delivered to such passenger; and, *provided, further*, that nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operating wholly or in part in the state.

SEC. 2. Any railroad company which shall charge, demand or receive any greater compensation for the transportation of any passenger than is authorized by this act, shall be fined for each offense not less than fifty dollars nor more than five hundred dollars; *provided*, that nothing contained in this act shall apply to electric lines and street railways owned or operated in this state.

SEC. 3. All acts or parts of acts inconsistent herewith are hereby repealed.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 600.

NORFOLK & WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.) In Equity.
W. G. CONLEY, ATTORNEY GENERAL FOR THE
STATE OF WEST VIRGINIA ET AL.,
Defendants in Error.

NOTICE

To the Norfolk & Western Railway Company:

You are hereby notified that, at twelve o'clock, noon, March 23, 1914, or as soon thereafter as counsel can be heard, the following motion to advance the above entitled cause will be presented to the Supreme Court of the United States.

A. A. LILLY,
Attorney General of West Virginia.

MOTION TO ADVANCE

And now come A. A. Lilly, successor in office to William G. Conley, Attorney General of the State of West Virginia, George D. Moore, Prosecuting Attorney of the County of Jefferson, D. B. Hardwick, Prosecuting Attorney of the County of Wayne, J. L. Stafford, successor in office to S. U. G. Rhodes, Prosecuting Attorney of the County of Mingo, F. C. Cook, successor in office to Robert R. Smith, Prosecuting Attorney of the County of McDowell, and A. M. Sutton, successor in office to John R. Pendleton, Prosecuting Attorney of the County of Mercer, and move this Court to advance the above entitled cause for an early hearing.

STATEMENT OF MATTER INVOLVED

The cause stands upon a writ of error from this Hon-

orable Court to the Circuit Court of Kanawha County, West Virginia, wherein a bill was filed by the Norfolk & Western Railway against the Attorney General of the State of West Virginia and the Prosecuting Attorneys of the various counties of said State through which the line of railway of the plaintiff runs, praying an injunction against said county and state officials, restraining them, and each of them, from the enforcement against the Norfolk & Western Railway Company, by action, fine, prosecution or otherwise, of the provision of an Act of the Legislature of the State of West Virginia passed on the twenty-second day of February, 1907, entitled "An Act Relating to and Regulating Passenger Rates upon Railroads in the State of West Virginia, and Prescribing Penalties for the Violation thereof," fixing a maximum two-cent passenger rate per mile upon all intrastate passengers carried by steam railroads of a certain classification within the State of West Virginia, upon the ground that said Act was unconstitutional on its face and has operated, and is operating, a confiscation of the property of the Norfolk & Western Railway Company, in violation of Article XIV of the Amendments of the Constitution of the United States.

A preliminary injunction was granted, and, after the defendants had filed their answer, denying the unconstitutionality of said act on its face, and denying the confiscation, and alleging the validity of the statute, testimony was taken upon both sides, and on the 15th day of March, 1913, the Circuit Court of Kanawha County entered a final decree holding that said Act of the Legislature was unconstitutional upon its face and that the Passenger Rate therein prescribed was not confiscatory in fact to the plaintiff, dissolving the preliminary injunction and ordering a redemption of the coupons issued by plaintiff for the excess of fares above the rates prescribed by the Act, which coupons had been issued under the provisions of a former decree.

Plaintiff applied to the Supreme Court of Appeals of West Virginia—that being the highest court in said state—for an appeal from and supersedeas to said final decree of the Circuit Court of Kanawha County, which appeal

and supersedeas was refused by said Supreme Court of Appeals on the 14th day of May, 1913.

REASONS FOR THE APPLICATION

This cause should be advanced for an early hearing for the following reasons:

First. The lines of railroad of the Norfolk & Western Railway Company traverse five counties in the State of West Virginia, and carry a large number of intrastate passengers, and said Company has, from the date of the institution of the present suit, that is to say, from the fourteenth day of August, 1909, until the present time, maintained an intrastate passenger rate in the State of West Virginia largely in excess of the rate prescribed by said statute and has issued, and continues to issue, to each purchaser of an intrastate ticket a coupon attached to the ticket, from which the excess fare of each intrastate passenger over and above the statutory rate prescribed may be determined, which excess was adjudged by the Circuit Court of Kanawha County, to be repaid to the holder of the coupons. Large sums of money in the aggregate have been collected, and are being collected, by the Railway Company, which will only be repaid upon the preservation and presentation of said coupons at the end of this litigation. There is no central place where such coupons can now be deposited for future redemption, and many of them are for small amounts, and many passengers receiving them do not understand their purpose or object; and, if the litigation is long delayed, many of these receipts or coupons will be mislaid or lost, which operates to the benefit of the said railway company and to the injustice of the traveling public compelled to pay the illegal rate of fare, and the interests of the State and of the citizens thereby jeopardized; and,

Second. The mere pendency of this suit, in consequence of the decision of the Supreme Court of Appeals of the State of West Virginia, suspends, in the absence of a supersedeas bond, the operation of the judgment below, and nullifies a regularly enacted statute of the State of West Virginia, and prevents the officials of such State

from enforcing its provisions, although the same has been held to be constitutional upon its face both by the Supreme Court of Appeals of the State of West Virginia and by this Honorable Court, leaving only for determination in this case the question whether or not it operates a confiscation in fact of the property of the Norfolk & Western Company.

C. & O. Company v. Conley & Avis, 67 W. Va., 129;

C. & O. v. Conley, Atty. Gen., decided June 16, 1913, 33 Sup. Ct. Rep, 386.

Third. While Wm. G. Conley, Attorney General, and the various Prosecuting Attorneys of the counties through which the said railway runs are named parties defendant, in truth and in fact this is a cause against the State of West Virginia wherein the said railway company is attacking and seeking to hold for naught the "two cent rate law" of said state, on the ground that said law is unconstitutional on its face and confiscatory in fact as to said plaintiff. The rights not only of said defendants are affected therein, but the entire citizenship of said state, as well as the traveling public of other states and countries is involved. The interests of the state and its citizenship are so directly affected,—the cause is one in which the general public has such a vital interest,—that the matters herein should be determined at the earliest practical date,
Sec. 949, Rev. Stat.

For the foregoing reasons, it is respectfully submitted that the public interests of the State of West Virginia, as well as the private interests of the traveling public and of its citizens, require an early disposition of this controversy; and this Honorable Court is respectfully requested to advance this cause upon its docket for hearing at an early date.

A. A. LILLY,

Attorney General for West Virginia.

Notice of the foregoing motion to advance is accepted this 19th day of February, 1914.

THEODORE REATH,

JOHN H. HOLT,

Attorneys for N. & W. Ry. Company.

OCT 5 1916

JAMES E. WARD

No. 177

October 5, 1916

My dear Mr. Ward:

I have just received your letter of the 3rd inst.

and am glad to hear that you are interested in the

work of the National Geographic Society.

Sincerely,
John M. Coulter

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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 197.

NORFOLK AND WESTERN RAILWAY COMPANY,
Complainants in Error.

vs.

W. G. CONLEY, Attorney General of the State of West
Virginia, et als., *Defendants in Error.*

BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA.

STATEMENT.

This is the only remaining two cent rate case in West Virginia. Four railroads, including Complainant in Error, the Chesapeake & Ohio, the Coal & Coke and the Virginian Railway, instituted suits in equity to annul the two cent rate Act of 1907. The two latter were recently constructed comparatively, and through sparsely settled and undeveloped territory and obtained decrees in the state courts against its enforcement as to them, because their returns from freight, passenger and all sources would not allow the passenger revenues to be

reduced. The Virginian Railway decision was satisfactory to the State, and was not appealed from the Circuit Court; but the decree in the Coal & Coke case held the Act to be unconstitutional on its face, and was appealed to the Supreme Court of the State, and was reversed in that particular.

Coal & Coke v. Conley and Avis, 67 W. Va. 129.

The Chesapeake & Ohio alleged confiscation, but afterwards abandoned the allegation, appealed to this Court upon substantially the same grounds set out in the first assignment of error in this case, and because of the classification, and because of interference with the railroad as an interstate carrier. The State decision was affirmed.

Chesapeake & Ohio Railway Co. v. Conley, et al., 230 U. S. 513.

Hence the first assignment of error in this case is abandoned.

All the other numerous railroads in West Virginia have uncomplainingly obeyed the two cent law from its inception.

The issue in this case is that of "confiscation."

Two main questions are presented by the record:

I.

(a) Does the railroad properly show the capital invested in its intrastate passenger service used and useful in that service?

(b) Does the railroad properly show the earnings and expenses derived from and chargeable to its intrastate passenger business?

These are absolutely necessary factors in determining the rate of return received.

II.

Should the railroad company be allowed to segregate

its intra passenger earnings from all other earnings in its attempt to show confiscation?

ARGUMENT.

I.

(a) Does the Railroad Properly Show the Capital Invested in Its Intrastate Passenger Service Used and Useful in That Service?

The segregation of the freight and passenger earnings, expenses and returns by both Mr. Coxe, an expert for the Railway Company, and by Mr. Hillman, an expert for the State, are questioned by each other, and are unsatisfactory and somewhat confusing. The railroad fixes as a basis the sum of \$1,391,902.31 as the value of its property in W. Va. used and useful in carrying intra passengers, and on which sum rates should be based, and adheres to this basis for the three years in which it questions the two cent rate. It is the basis on which its entire superstructure of figures is built. This basis is ascertained by taking the *valuation of its property as a going concern made by the Board of Public Works for purposes of taxation*, for the year 1907, to-wit, the sum of \$31,000,051.45 and dividing it between the passenger and freight traffic according to the gross earnings from each; the entire gross earnings in the State were \$8,090,028.56 and the gross intra passenger revenue was claimed to be \$362,997.74 or 4.49% of the entire gross earnings. This 4.49% applied to the assessed value of \$31,000,051.45 produces the \$1,391,902.31 used by the railway as the value of its property used in intra passenger service. (Answers to questions 22 and 23, p. 26, record.) (Also paragraph 2 of bill, p. 5, record.) This valuation is improper for a rate basis.

People v. N. Y. State Board, 199 U. S., 1
Sup. Ct. 705, 50 L. ed. 65.

San Francisco v. Dodge, 197, U. S. 70, 25
Sup. Ct. 348, 49 L. ed. 669.

"Valuations placed upon railway properties by the State Assessor for purposes of taxation do not afford an adequate basis for a determination as to the fair value of the property when testing the reasonableness of State regulation of railway rates especially where the principles governing the assessment are not properly shown."

4th pt. Syllabus *Missouri Rate Cases*, 230 U. S. 474, 57 L. ed. 1571.

"A division of the value of the property of an interstate carrier within a state according to gross earnings derived respectively from its interstate and intrastate business in such state, does not give a sufficiently accurate measure of the value of the use of its property in intrastate business to serve as a basis of a judicial holding in a close case, that the intrastate rates, as fixed by the State, are confiscatory."

8th pt. Syl. *Missouri Rate Cases*.

Allen v. St. Louis F. M. & S. R. Co., 230 U. S. 552; 57 L. ed. 1625.

Chicago M. & St. R. R. Co. v. Tompkins, 176 U. S. 167; 44 L. ed. 417.

As a result of this basis, and not taking into account any of the earnings from interstate passengers allowable to West Virginia, he makes the return to the railroad for the year ending June 30, 1907, 3.73% omitting expenditures for additions and betterments, which if charged, would reduce the return to 2.15% (p. 26, Q. 27, record). For the year ending June 30, 1908, 1.04% (p. 36., Q. 78, record). For 1909, no return. (See Ex. J. W. C., J-1, p. 121.)

Witness for the State, Mr. Hillman, does not attempt to place any valuation upon the property of the railroad in West Virginia used and useful in its business for either passenger or freight purposes.

His tables and analysis are based upon the expenses and income as shown by the figures of the railroad company. Asked how he would determine the capital devoted to intra passenger trains on p. 119, record, after testifying that he had made no computation of such capital he said, in answer to cross-question 4:

"I would determine the total value of the property in the State of West Virginia. I would then take the expense account as I have determined, and find the relation of each one of these expense accounts to the total expenses in West Virginia and assign that per centage of the capital to the business in hand."

His calculations are based upon the revenues and expenses of the intra passenger business (not taking into account any amount allowable to West Virginia from interstate passenger revenues) for the months of Nov., 1909, and May, 1910; because he had used those two months in an earlier controversy between the railroad and coal operators concerning coal shipments to the Great Lakes, which prior examination facilitated his present examination of the railroad figures, and his evidence in this case. (p. 182, Q. 9, record.)

(b) Does the Railroad Company Properly Show the Earnings and Expenses Derived from and Chargeable to Its Intrastate Passenger Business?

In the computations and tables made by both of these witnesses of intra passenger receipts, no account whatever was taken of the portion of inter state passenger receipts which should be added to the revenues derived from the West Virginia passenger trains, and the use of other property in West Virginia devoted to the inter state passenger traffic. On p. 48, record, Mr. Coxe was asked cross-question 6.

Q. "Then no amount for the revenue to your company from interstate passengers going from an other state into West Virginia, and also going from West Virginia into another State were included in this amount?" (\$362,997.74 derived from intrastate passenger fares in 1907.)

Ans. "That was from the transportation of intrastate passengers exclusively."

Mr. Hillman was asked p. 212, record:

Q. 66. "Do your accounts, as shown by your exhibits, take into consideration any part of the passenger fares received from interstate travel?"

Ans. "No, sir; the interstate is entirely eliminated from the earnings, and by my method, from the operating expenses. None of the West Virginia proportion of the interstate traffic is taken into account, either in the earnings or method I have of dividing the expenses."

Q. 67. "If West Virginia's proportion of the interstate travel had been taken into your computations, would it not have materially increased the passenger revenues?"

Ans. "Yes, sir; it would have increased the passenger revenues both gross and net."

A serious error in basis chosen by the Railroad Company appears on page 31, wherein Mr. Coxe states that the expenses of a division partly in one state and partly in another are subdivided between states on the basis of the mileage of track in each state through which that division runs. This method sounds reasonable but is far from such. For example, the main line of a division, having a heavy tonnage, numerous trains, heavy grades, and, by reason of geographical conditions an expensive piece of track to keep in repair, may be entirely in one state. The remainder may be a branch line with scarcely any tonnage, few trains, easily kept in repair, and lying wholly within another state, and yet on the Norfolk & Western basis Mr. Coxe would charge to that state in which the branch line was located that percentage of the expenses for both the main line and branch line which the track mileage of the branch line bore to the total track mileage of the main line and branch line regardless of the actual expenses incurred by each. This basis is simply chosen by the Norfolk & Western Ry. Co. in order to facilitate and expedite the work, and serves its purpose in making reports for comparative purposes, but does not show a true statement of expenses any more than would the division by two of a man's salary who had charge of two departments show the amount which should be properly charged to each department. The correct basis would be the amount of his time spent in each department.

The division of expenses as between passenger and freight is made by the Norfolk & Western Ry Co. upon the basis of allocations as far as their accounts show, and then the common items of expenses, with the exception of engine repairs, are divided on the basis of road engine miles, which it is claimed assigns 20% to passenger and 80% to freight all show the fallacy of these percentages below. The engine repairs were divided by the railway company between passenger and freight upon the basis of engine miles both road and yard, all switch engine miles being considered as freight. Mr. Coxe, by treating his engine repairs in this manner, recognized the fact that yard expenses are a very important item, not only in the total cost of operating a road, but also in dividing these expenses between freight and passenger, but in no other instance save the actual yard expenses themselves has he considered the expenses accruing due to yard service in his division between freight and passenger.

The road engine percentages of 20% passenger and 80% freight have been adhered to by the Norfolk & Western Ry. Co. for a number of years without change—their origin being lost in the mists of antiquity, “as a means of facilitating and expediting the work,” to quote their witness, Mr. J. W. Coxe, who also states, on pages 75 and 76, in answer to question 102, “in the operation of a railroad it is essential that you should have a percentage easy of calculation.”

The choice of one general factor, together with the changing of that factor to one which is easy of calculation would suggest to those familiar with railroad statistics that it was done in order to make comparisons from year to year more than with the idea that it would show a true statement of facts and relation of expenses. However, these road engine mile percentages, 20% passenger and 80% freight, are for the entire Norfolk & Western Ry.

Co. system some previous year, and do not represent a true relation of the road engine miles in West Virginia or even the system for the current year which, according to Mr. Coxe's own computation (page 76) was 16.23% passenger and 83.77% freight. Mr. Coxe stated on page 78, that if a part of the Norfolk & Western line in West Virginia were separated from the Norfolk & Western system he would use a percentage for that line so separated based upon the road engine mileage, passenger and freight, on the line so separated. This is in itself an admission on his part that the actual relation and percentages in West Virginia should have been used in making up his exhibit in place of the percentages for the system, which were so changed as to be easy of calculation. Mr. Hillman in his analysis used the actual percentages in each and every instance and did not in any one instance change a figure so that it would be easy "of calculation" or to facilitate or expedite his work.

Had Mr. Coxe used the actual road engine mile percentage in West Virginia for the fiscal year ending June 30, 1910, he would have assigned considerably less expenses to intrastate passenger than he did show, for the following reasons: In round figures 60% of the total operation expenses can either be directly allocated or assigned on factors so closely related to the expense that they can be taken as the equivalent of a direct allocation. This would leave 40% of the West Virginia expenses to be assigned to passenger and freight on the basis of 20% passenger and 80% freight. Applying the 40% common expenses to the total expenses for the year ending June 30, 1910, namely \$4,921,368.50, J. W. C.'s exhibit K. L, page 122, we would get for our unallocated amount \$1,968,547.40, 20% of which on Mr. Coxe's basis would charge to passenger \$393,709.48, whereas the actual West Virginia percentage of 16.23% would only charge \$319,495.24, a difference of \$74,214.24. Deducting this \$74,

24.24 from Mr. Coxse's passenger expenses amounting to \$563,694.24, we would have as corrected expenses to passenger \$629,399, which is 87.63% of the earnings of \$718,726.00. Applying 87.63% to the intra passenger earnings of \$356,505.10, we would get \$311,529.12 as intra passenger expense, leaving \$42,975.98 as intra net earnings from operation instead of \$10,651.85 as shown by Mr. Coxse. Deducting taxes and further expenses and adding miscellaneous income, we would have available from intrastate passenger for surplus and dividends \$5,862.88 instead of a loss of \$27,661.25, or a total difference of \$33,524.13 between amounts shown by Mr. Coxse and the amount which would have been shown had Mr. Coxse used the engine mile percentage for West Virginia, a handy little burden for intrastate passenger to bear, because 20% was such "a convenient factor to use."

Had Mr. Coxse used the West Virginia road engine miles and changed same to a percentage easy to calculation he would have used 15% the nearest round factor, instead of 16.23%, the actual percentage, and instead of 20% as used by him, in which event he would have had a surplus of \$16,812.44 instead of a loss of \$27,661.25, or a total difference of \$44,473.69.

The Interstate Commerce Commission and practically all State Railroad Commissions agree that there is no one general factor whose application to all common expenses will fairly represent the relative expenses which should be charged to passenger and freight.

Mr. Hillman recognized the fact that the expense of maintaining tracks, fuel and water stations, engine houses, turntables, etc., where switch engines were employed, should be divided between road and yard expenses upon the basis of use, and that this division should further be divided between freight and passenger and state and interstate upon the basis of use, whereas the Norfolk & Western in their analysis and division of

expenses especially as applied to maintenance of way expenses do not consider the expenses accruing to the yard engines at all, simply ignoring it as a factor, regardless of the fact that there may be from one to six switch engines working in a yard twenty-four hours per day and wearing out tracks.

There is practically no comparison in accuracy between the operation expenses charged to passenger and freight by Mr. Hillman and Mr. Coxe, as Mr. Hillman's is based on actual percentages, conditions, and a thorough analysis of the expenses under consideration, whereas Mr. Coxe used percentages for the Norfolk & Western system as a whole, changed these percentages to one easy of calculation and maintained by it for years regardless of change in conditions and did not take into consideration the origin, source or reason for any common expense whatever.

On page 66, Mr. Coxe says that he assumed it cost as much to earn a dollar of interstate business as a dollar of intrastate business, and made no attempt whatever to ascertain what the difference in expenses was, though he did state that he knew it cost more to do intrastate business than to do interstate business. The basis chosen by him is so evidently erroneous that it needs no further consideration except perhaps the comment that it facilitated and expedited the work. Mr. Hillman, however, made an analysis based on all available facts and factors, and took into consideration in his division of expenses between interstate and intrastate not only the expenses which accrued to state and interstate equally, but also the expenses which accrued two and three times as heavy to state as to interstate, and did not attempt to facilitate or expedite his work in any way whatever, but followed the method used by him in all his cases, regardless of what the result would show. In this connection we wish to say that Mr. Hillman would have been justified in not

making any charges to intrastate expenses for the expenses incurred under the heading of Outside Agencies under Traffic Expenses, for reason that these outside agencies are not in a position to siphon intrastate business and all their expenses should therefore, be charged directly to the work benefited, or, in other words, interstate expenses. Mr. Hillman, however, did not take this advantage, but treated it the same, as if intrastate should have participated in the expenses. P. 57, Q. 56, Mr. Coxé states there is no competition on intrastate business, but that there is on inter—hence the traffic expenses must be mostly inter.

On page 106, Mr. Coxé states that in his opinion the other Items of Passenger Revenue should be assigned to interstate and intrastate upon the basis of interstate and intrastate passenger revenue, or in other words, the by-products of passenger and freight business should be made upon the basis of the passenger and freight revenue. How erroneous this assumption is can best be shown by assuming that the rate in West Virginia for the year ending June 30, 1910, had been four cents instead of two cents, and that the total passenger revenue earned would remain the same. If this had been the case, West Virginia intrastate passenger would have been entitled to twice as much of the other passenger train revenue as it received under the two cent rate, regardless of the fact that this other passenger train revenue was incidentally the same in both instances, that the railroad company received no more for handling it and that it cost the railroad company not one cent more to handle it, and still simply because the passenger rate itself was changed he would assume that the excess baggage rate, the rate on mail, express, milk on passenger trains, passenger train privileges, etc., would accrue twice as heavy to intrastate as to interstate. It will be noted that on page 117-18 of the record, X. Q. 1 to 10, Mr. Coxé's the-

ory of the assignment of the mail, express and baggage earnings to inter and intra on the basis of the passenger revenue inter and intra is most effectually disposed of on his own admissions. The logical method and the only method in the absence of the actual determination of the cost of conducting each class of passenger business, is to allow the intra and the inter such a respective proportion of these earnings as they have stood of the expenses. Had the time permitted, the proper procedure would have been to determine the expenses of conducting the express business, the mail business, the baggage business, the parcel and privilege business and the miscellaneous business and deduct that from the total passenger cost, treating each of the 116 primary accounts separately, and then determine the portion of the residue assignable to each the inter and intra passenger business. This result would hardly have changed the result save in a way favorable to the state of West Virginia, as it is a matter of common knowledge that in the mail investigations before congress and the express investigation before the Interstate Commerce Commission, the Railroads have claimed loss in each case.

Mr. Coxe again chooses the earning basis in assigning the value of property devoted to intrastate use. Again he would have twice as high a value put on the property devoted to intrastate passenger use if our total revenue and our passenger one mile intrastate remained unchanged and our rate per passenger mile intrastate had been four cents instead of two, and yet identically the same property was devoted to intrastate passenger use. The total actual value of this property was identically the same and the same number of people, the same people would have used the same facilities in the same manner and to the same extent and for the same purposes, and still, simply because the rate would have been four cents instead of two cents per passenger mile intrastate,

Mr. Coxe would have placed twice as high value upon this property devoted to intrastate passenger use. In the same manner as long as you don't change Mr. Coxe's total earnings or total operating expenses, regardless of what rate you receive per passenger mile intrastate, you would still be unable to earn a surplus on your intrastate business even if same were at the rate of ten cents per mile. This plainly shows his basis to be erroneous, and the most favorable construction that can be put upon its choice is that it was "to expedite and facilitate the work."

Considering this matter from a little different standpoint, it is evident, 1st, that the value of the property used depends on the use; 2nd, that the use is reflected by the operating expenses; 3rd, that the "capital" used by the road in conducting its business is in this analysis equivalent to the cost of the property used. That the relative operating costs of inter and intra is the true basis by which to determine the relative amount of capital used by each class of business. Hence it can readily be seen that the method used by Mr. Coxe in assigning expenses to the intra business is erroneous and illogical.

Note the cross examination of Mr. Hillman on this point, page 119 of the record.

Mr. Coxe's attempted re-analysis of the intra passenger on pages 106 and 107 of the record depend entirely on the supposition that the "by-products" of the passenger business, viz: Express, mail, baggage, etc., are assignable to intra on the earnings basis. And since that is incorrect, the re-analysis is, of course, faulty. This Court held in *Simpson v. Sheppard*, 230 U. S., p. 460, 461, that the earnings basis is erroneous as a general factor in all calculations pertaining to the division of expenses as between freight and passenger interstate and intrastate, and the assignment of property devoted to public use between freight and passenger, state and in-

terstate. The use of the earnings factor is erroneous except in a few instances, such as expenses which are due to the weather conditions and a few others, such as traffic expenses where no allocation is available, and that as a general factor it has no bearing whatever, either in relation to expenses, earnings or property devoted to public use. In fact, many of our very prominent railroad account officials condemned the earnings basis before the Supreme Court ruling and frankly acknowledged that the only reason they continued to apply it to their expenses and statistics was for comparative purposes and even went so far as to deny the correctness of all their statistics based upon any one general factor, such as train miles, car miles, engine miles or earnings. It is the height of absurdity to take the position that because you receive \$20.00 for handling a carload of cement between two stations it costs you twice as much to handle this cement as it would to handle a carload of crushed stone, for which you receive but \$10.00, when the weight of the cement and the stone was identically the same. They were both loaded and unloaded without any expense whatever to the railroad company excepting as to billing; both were handled in the same kind of car, in the same train, by the same engine and the same distance. This clearly demonstrates how erroneous the earnings basis is as a general factor, and also shows very clearly that if a rate is not remunerative, regardless of what the existing rate is, if you do not change your total earnings and if you use the earnings basis, your rate would still remain unremunerative.

We now come to Mr. Coxe's criticism on Mr. Hillman's exhibit No. 5, which gives an approximate cost per ton mile for handling intra freight. In this regard we wish to emphasize the fact that this table shows the cost per ton mile. The haulage costs may be supposed reasonably to accrue per mile hauled, as taken up and treated by Mr.

Hillman's exhibit No. 5, therefore the attempted expansion of these items under primary accounts 25, 34, 35, 80, 81, 82, 83, 84, 85, 88 and 89, as set forth on pages 110, 111 and 112, is totally inconsistent with either the ideas of Mr. Hillman or with the premise with which the paragraph is started viz: that haulage accrues per mile hauled, or, to use railroad parlance, per ton mile. As far as this consideration goes, therefore, Mr. Coxe's attempted expansion may be dismissed.

We may now turn to the "implied" considerations that Mr. Coxe intimates rather than says exist. He is very careful on this occasion not to include any of the branch tonnage statistics that he afterwards introduced on pages 109 and 110 to show the less average haul of inter and intra. It is evident from our statement in the preceding paragraph that these average hauls do not affect the haulage as it accrues per mile hauled. It is also evident from Mr. Hillman's exhibit 51 and his method of handling it as shown on pages 199 to 203 that full allowance has been made for this difference in average haul in all expense accounts where it should apply.

It is hardly worth while to follow the fanciful "corrections" of Mr. Hillman's exhibits made by Mr. Coxe, pages 113 to 116, as they all depend on Mr. Coxe's condemned revenue theory.

All the testimony of Mr. Coxe, 97 and 98, in reference to the exchange of traffic between branch and main lines is utterly futile in view of the fact that he could not quote a pound mile, only pounds. Now it is evident that a pound of freight exchanged between main line and branch line must make pound miles on main line as well as branch, and also that on the main line it has a low cost and on the branch line a high cost, but in default of the production of the data by Mr. Coxe, of the mileages made on branch and main lines, no relative cost of inter and intra can be derived from merely exchange pounds.

Mr. Coxe's figures are certainly misleading in this regard and it was with reference to showing this error and demonstrating the insufficiency of the data that the cross questions 29 to 37 on pages 103 and 104 of the record were propounded.

We direct attention to cross-questions 21 to 27, pages 102 to 103, when Mr. Coxe confidently quotes engine mile percentages to support his 20% used in the division of expenses between freight and passenger and then acknowledges that the moment his percentages are checked it falls 15% from 18.76 to 16.23 and he utterly fails to account for this. Take this in connection with his acknowledged error in his engine miles and method of assignment to W. Va., as shown on pages 72 to 77 and the conclusion is inevitable that the 16.23% is liberal to passenger and that 1907, 1908 and 1909 are erroneous.

We also direct attention to the fact that the expense set up by Mr. Coxe in his exhibits of the Kenova D. W. are based on track miles viz: 82.39% to W. Va., see Q. 46 and 47, p. 30, 31, of the record. See also cross-questions 50 to 65, pages 70 and 71, where Mr. Coxe acknowledged that road enginemen and trainmen at least accrue expenses as they make mileage. See also cross-questions 66 to 67, p. 70 and 71, where Mr. Coxe had given mileage percentage for engines, trains and cars differing decidedly from the 82.39% used. Page 73, cross-questions 75 to 80, deals in car and train miles and these figures were afterwards fully confirmed by Mr. Coxe. The expenses, however, set up by Mr. Coxe have never been corrected by him on any exhibits and it is therefore but equitable to presume that such corrections would result in costs not far greater, if any, than those of Mr. Hillman, the defendant's witness.

The attempt of the railroad to separate its intra passenger business from its inter passenger, and to segregate its passenger earnings and expenses from its freight

earnings and expenses, in order to show a confiscation of its property under the Two Cent Law, is not clear and convincing, is founded on methods of computation disapproved by this Court, and will not justify a decree sustaining the claim of confiscation.

II.

Should the Railroad Company be Allowed to Segregate Its Intra Passenger Earnings from All Other Earnings in the State in Its Attempt to Show Confiscation?

The Constitution of West Virginia makes it the duty of the Legislature to pass laws, from time to time, "applicable to all railroad corporations in the state, establishing reasonable maximum rates of charges for the transportation of passengers and freight, and providing for the correction of abuses, the prevention of unjust discrimination between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public." Const. W. Va., Art. XI, Sec. 9.

Pursuant to this mandate the legislature passed, on December 27, 1873, Chapter 227, Acts 1872-3, an act classifying railroads according to their gross annual earnings per mile, as a basis for the determination of maximum passenger and freight rates, and fixing a maximum passenger rate; classifying goods, merchandise and all other property, and fixing maximum freight rates. In 1895 the Legislature repealed that portion of the Act of 1872, relating to freight rates, by passing an act requiring railroads to use for intrastate traffic the classification of freight rates used by them for interstate traffic, and prescribed tariffs of charges in connection therewith; and to prevent discrimination. Section 2 of that Act fixed the maximum freight rate, and, in part, is as follows:

"Every such corporation, company, public carrier or individual shall also within thirty days after the passage of this act make a tariff of charges within this State, based

upon the classification provided for in the first section of this act, which tariff shall show such charges for distances over ten miles, and by sections of ten miles each, from ten to three hundred miles; Provided, that the average rate of charge for all classes of freight under such classification and tariff, as fixed for the whole number of sections up to three hundred miles, shall not exceed five cents per ton per mile, except that upon gypsum, lime, guano, and other fertilizers, salt, flour in barrels, and upon coal, pig-iron, limestone, iron ore and undressed stone, logs or lumber, such average rate of freight shall not exceed three cents per ton per mile."

N. & W. Ry. Co. v. Pinnacle Coal Co., 44 W. Va. 574.

In 1907 the Act complained of was passed fixing a Two Cent rate for intrastate passengers. It was held by the Supreme Court of West Virginia in *Railway Co. v. Conley and Avis*, 67 W. Va., p. 174:

"This Act (the 2 cent rate act of 1907) is in form an independent separate act, but in legal effect, an amendment of the other statutes relating to the subject matter thereof, in existence at the date of its passage. The intent to amend is not expressed in terms. It does not say the act of 1873, as amended by the act of 1895, is hereby amended, but that is necessarily implied, for it is thrown in with the mass of former legislation to become effective and operative as a part thereof and displace so much of it as is inconsistent. It is an amendment by implication, repealing existing laws so far, and only so far, as it is inconsistent therewith."

This act should not be segregated, but considered as a part of and in the light of the entire state legislation regulating passenger and freight rates. This was done by the Court in *Simpson v. Sheppard*, where the 2 cent rate Act of April 1, 1907, was considered with the order of the Commission of Nov. 15, 1906, fixing maximum class rates for general merchandise. The State has not regulated intrastate passenger rates separately by that Act as stated in brief for appellant, and it should not be considered separately by this Court in determining if the same is confiscatory.

It will be observed that liberal maximum freight rates are allowed to be charged. It is the legislative policy to give greater returns on the freight traffic and lesser returns on the passenger traffic. This the legislature has the right to do. It can constitutionally enact that persons shall be transported at a lesser rate than property, if reasonable returns are allowed to the railroad.

In the year 1907 the intra passenger business of the railroad was 4.49% of the entire business and the freight traffic was 95.51% of the entire business. (p. 32, printed record.) The net earnings for that year from operations in West Virginia were over 8% (not subtracting from net earnings the amount charged to betterments). In that year the common stock received 5% dividend. The preferred stock has regularly received 4% dividends for many years. Practically the same figures exist for 1908, 1909, and 1910. Common stock received 4½% in 1908; 4% in 1909; and 5% in 1910. In 1911 after paying all operating expenses, fixed charges, and the 4% to the preferred stock the railroad could have paid its common stock 9% plus if it had not put over 2½ millions into additions and betterments. For that year the common stock received 5% (p. 88, record). In 1912 the net earnings were 9.9%, if about 1 1-3 millions had not been charged to improvements and betterments. The common stock received 5%. Pending this suit the common stock has been increased from 66 millions to \$85,653,000.00, an increase of \$19,653,000.00 and increased dividends have been paid thereon, including this increased stock. (p. 91, record.) The market value of the common stock in 1910 was 96 to 98.

The costs of betterments is obviously capital invested and if taken out of the earnings of the railroad, (as has been done every year under consideration in this litigation) ought to be regarded for purposes of rate making, as a part of the net earnings. Otherwise a railroad could

absorb all or a great part of its net earnings in the costs of betterments of its property, and be in a position in almost any year to say it is not earning a fair return on its investment.

Railway Co. v. U. S., 99 U. S. 402, 420.

Obviously this complainant has been making exceptionally large net earnings under the Two Cent rate law. The intra passenger business is a very small part of its business, in this State, less than 5%, and should be regarded as a subsidiary business. Its main line in West Virginia taps the richest coal field in the world. It was built for that purpose. It has been estimated that only $\frac{1}{2}$ of 1% of the rich deposits of coal within its "sphere of influence" has been removed. Its passenger business is merely incidental; and yet taking the figures of complainant, based as they are upon improper valuation, and unfair in the division of income and expenses with the freight business, it is shown that the intrastate passenger business does not draw on the other departments for operating expenses, but contributes substantially above operating expenses to the general return.

The Interstate Commerce Commission lays down the sound proposition that not all classes of traffic can be expected or required to contribute equally to returns on investments and that as long as some return above handling costs, i. e., that the traffic contributes something to overhead expenses (not returns on investment, mark you, but overhead expenses) that the rate may not be unreasonable, but have its place as a filler to other business and as relieving the other business from burdens that it would otherwise have to carry alone. In this case the intra passenger business not only so contributes to the overhead expenses but bears its full share of such expenses and contributes to relieve the other classes of business from the full burden of the interest charges.

We would present most earnestly for the consideration

of the Court, that all classes of business cannot be equally remunerative; that the very classification of freight rates into 1st, 2nd, 3rd, etc., classes indicates that other considerations than cost enter into the railroad problem. That distance from markets of a commodity must be recognized, and the needs of the market community might necessitate the reduction of a rate to a low remunerative basis, and yet it would contribute to lessen the burden on other commodities, for instance grain from Western producing states needed to supply Eastern communities. That this status exists on the N. & W. in reference to the passenger business is indicated on page 51 of the record, cross-question 24, where Mr. Coxe acknowledged that the "freight business is the great money-making business of it" (the N. & W.) Examination of Mr. Coxe's exhibits D-1, etc., show that only 11 to 12% of the business is passenger and a very small proportion of that intrastate.

Under the facts this complainant should not be allowed to separate its intra passenger business from the great bulk of its operations bringing in extraordinary returns, and ask relief against "*Confiscation.*"

This Court has declared repeatedly that if the State allows a railroad to earn suitable revenue from its business as a whole it may require the company to carry at unprofitable rates upon separate parts of the road, (*St. Louis v. Gill*, 156 U. S. 649, 15 Sup. Ct. 489, 39 L. ed. 567), and upon separate kinds of traffic. *Minnesota Rate Case*, 230 U. S. 352. In this last cited case the Court said:

"We express no opinion with respect to the method adopted in dividing expenses between the passenger and freight departments. For the purpose of determining whether the rates permit a fair return, the results of the entire intrastate business must be taken into account."

Also in *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, where coal rates were considered, the Court said:

"Notwithstanding the evidence of the defendant that, if the rates upon all merchandise were fixed at the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the Commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In *Smythe v. Ames*, we expressed the opinion that reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or to the profits derived from it, (quoted in appellant's brief, p. 15) but it by no means follows that the companies are entitled to earn the same percentage of profit upon all classes of freight carried***. We do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and the burden is upon them to impeach the action of the commission in this particular."

The same principle is announced in *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382.

In *Atlantic C. L. R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, the railroad company was required to maintain a daily passenger train at a loss, where it was not shown that loss would make the net return on the state business so low as to make it confiscatory.

"The courts will not interfere or grant relief to a railroad company upon a complaint made as to one or several rates only, or where the freight and passenger rates established by the commissioners are not assailed as an entirety."

Pensacola & Atlantic R. Co. v. Florida, 3 L. R. A. 661.

An allegation that statutory rates were inadequate was held bad on demurrer by the Supreme Court of Arkansas because it did not aver that the statutory rates prevented a profit on the company's traffic as a whole.

60 Ark. 221; 29 S. W. 752.

This company is making large returns on its intra passenger and freight business, paying dividends, investing net earnings in improvements, in short, making between 6% and 8% on its investment. If its intra passenger business is not remunerative, it follows that its freight business is more than remunerative, and it is charging unjust and unreasonable rates for its freight. In one branch it claims injustice, while in the other branch it is admittedly perpetrating that same injustice, and appeals to a court of equity. "He that seeks equity, must do equity." The investment of the stockholders is in the entire property, and not in the passenger or freight departments, and the state by its legislature has permitted a handsome return on the entire property. The reduction occasioned by the Two Cent Law on the returns would be negligible, a small fraction of 1%.

The reasoning of Justice Mestrezat in his dissent in *Penna R. R. Co. v. Philadelphia*, 220 Pa. St. Reports at page 122 is pertinent:

"I am clearly of the opinion that in determining whether a rate for transportation is reasonable or not, all the revenues of the company should be considered, including receipts from freight, expressage, packages and all other sources. This principle is recognized in the adjudications of the Supreme Court of the United States, and by the decisions of the Interstate Commerce Commission; *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649; *Smythe v. Ames*, 169 U. S. 466; *Board of Comm'rs. v. Railway Co.*, 7 Interst. Com. Rep. 69; *Brabham v. Atlantic Coast Line R. R. Co.*, 11 Interst. Com. Rep. 464. In ascertaining a reasonable rate for the transportation of passengers, the company has no right to segregate the passenger traffic and exclude the other sources of revenue. The railroad is an entity, its being is created by a charter granted by the commonwealth declaring it 'a public highway for the conveyance of passengers and the transportation of freight'; it acts as a body, its tracks are all owned and used by the corporate entity, and its stockholders receive their dividends from the net proceeds of its entire traffic. Why, then, in ascertaining a reasonable rate for passenger traffic should the revenue from that traffic alone be considered? The stockholders are

the owners of the corporate franchises, as well as of the corporate property generally, and a fair income from the investment is what they are entitled to receive; hence they have no right to compel the passenger traffic on their road to pay a rate of transportation which, when considered with the return from the freight and other traffic, would make an exorbitant or unfair rate to them on their investment. Their investment is in the corporate franchise and property, and the income from that investment necessarily comes from the freight as well as the passenger traffic, and, in determining what is a fair and reasonable return on their investment, it necessarily follows that the receipts or revenues from all sources should be considered. This view is strengthened by the fact that it is impossible to accurately determine what revenue the company receives from each of the several sources. The trackage, the stations, the offices and other property are owned, not by the freight department nor by the passenger department of the road, but by the company itself, and hence, in making a division of the receipts and expenditures, it is wholly impracticable to ascertain accurately and definitely the receipts from either of the several sources of revenue. As the net revenues from all sources go to the stockholders, constituting the return on their investment, and the property from which those revenues are derived is the property of the stockholders, the fair rate or recompense for the investment in that property belongs to the stockholders, and should be counted on the entire traffic."

Rate of Return on Investment.

The question of the rate of return is not important in this case, as we deem it will be conceded that 6% plus is reasonable. In 1869 this Court said:

"It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. **** Each case must depend upon its special facts."

Covington & L. T. R. Co. v. Sanford, 164 U. S. 578.

This Court has not named the rate of return to which a railroad would be entitled upon proper valuations in normal cases. The state and lower federal courts pre-

sent a wide range. The rule announced by Justice Brewer, then in the Circuit Court, in 1888, in the case of *Chicago and Northwestern v. Dey*, 35 Fed. 866: "That where the proposed rates will give some compensation, however small, to the owners of the railroad property the courts have no power to interfere. Appeal must be then made to the legislature and the people. But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere and protect the companies from such rates;" has been modified, and properly so, and now the general rule seems to be that reasonable rate of return should be allowed, depending upon the circumstances in each case.

The decree of the lower court should be affirmed.

A. A. LILLY,

Attorney General of West Virginia.

October, 1914.

No. 197.

October 1916

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In the Supreme Court of the United
States.

OCTOBER TERM, 1914. No. 197.

*Norfolk and Western Railway Company, Com-
plainant Below and Appellant,*

VS.

*W. G. Conley, Attorney General of the State of
West Virginia, et al., Respondents Below and
Appellee.*

**REPLY BRIEF OF COUNSEL FOR NOR-
FOLK AND WESTERN RAILWAY COM-
PANY.**

The brief of the Attorney General on behalf of the State of West Virginia argues three points, designated I, (a) and (b), and II. We shall use the same designation.

“(a) Does the Railroad Properly Show the Capital Invested in Its Intrastate Passenger Service Used and Useful in That Service?”

The argument of this point commences with the intimation that tax value does not afford an adequate basis for the determination of the fair value of property when testing the reasonableness of State regulation. The Missouri Rate Cases of *Knott vs. C., B. & Q. R. R. Co.*, 230 U. S., 474, are relied upon, in which Mr. Justice Hughes pointed out defects in the assessed valuation as not a correct guide in that case. The value taken there was the value ascertained “by the state assessing board, for the purpose of taxation, multiplied by 3,” the assessment being supposed to be on the basis of one-third of the value. Other companies in the case had values found at *twice* the assessed value. In West Virginia the assessment is required by the statute to be made at the “true and actual value” (West Virginia Code of 1906, Section 696). The principles governing the West Virginia assessments of railroads are set forth in Hogg’s West Virginia Code, Vol. I, Sections 968 and 969, which sections are printed in the Appendix, No. 2 of this brief. There was not here any artificial value based on doubling or trebling an assessment.

Another contention under point (a) by the State is that the *division* of capital as between intrastate passenger business and other business in West Virginia of this complainant by gross earnings was inaccurate. Our opponents urge that as this division is not "an accurate measure" (the Minnesota Rate Cases, 230 U. S., 352, at page 459) of value of the use, so the evidence of the Company's witness based thereon is not sufficient to prove confiscation.

To this and the preceding criticism we reply that the witness for the State reached the result of confiscation by the method of comparing expenses with earnings (without the necessity of finding total or divided capital) so that as stated by this Court in The Minnesota Rate Cases (Opinion of Mr. Justice Hughes as to M. & St. L. R., 230 U. S., at page 472):

"It is not necessary here to reproduce the computations, as we are satisfied, after a careful examination of the evidence, that while the methods of estimating value, and of apportionment, which have been disapproved in the discussion of the cases of other companies, are subject to the same objections in this case, so far as they have been employed, the margin of error which may be imputed to them is not sufficiently great to change the result."

And in finding confiscation as to certain railroads in *Knott vs. C., B. & Q. R. R. Co.*, 230 U. S., 474 (The Missouri Rate Cases at pages 507-8), Mr. Justice Hughes, writing the opinion of this Court, said:—

“The exceptions are these: In the case of the St. Louis & Hannibal Company, operating, as found by the court below, 120.61 miles, within the state, the net revenue from the entire Missouri business, interstate and intrastate, for the fiscal year ending June 30, 1908, appears to have been \$15,687.18. In the case of the Kansas City, Clinton, and Springfield Company, operating 151.01 miles within the state, the net revenue from the entire business therein, interstate and intrastate, for the same year amounted to \$32,500.72. In each of these cases the experts employed by the parties unite in the statement that it is apparent from the results shown that ‘upon neither the revenue nor ton mile nor passenger mile theory of expenses can any adequate return on the investment be earned.’

“In the case of the Chicago Great Western Company, operating 84.43 miles of road within the state, the entire net revenue from the Missouri business, interstate and intrastate, for the six months ending December 31, 1907, being the period taken by both parties for the purpose of calculation, amounted to \$41,839.06. From our examination of the

evidence and the various computations we are satisfied in this case, as in the two others above-mentioned, that errors attributable either to valuation or to apportionments cannot be regarded as sufficiently great to change the result."

The case at bar is a case such as was suggested by this Court in the Minnesota Rate Cases (230 U. S., 352, at page 459):—

"Doubtless there may be cases where the facts would show confiscation so convincingly in any event, after full allowance for possible errors in computation, as to make negligible questions arising from the use of particular methods."

In the case at bar the witnesses for both sides, using different methods, arrived at the result that the two cent rate is not remunerative to this Company on intrastate passenger business in West Virginia. Mr. Hillman, the State's witness, in distributing expenses adopted comparable use-units intended to conform to the principle later suggested by this Court in the Minnesota Rate Cases for the division of capital. (Opinion of Mr. Justice Hughes, 230 U. S., 352, at page 461):

"When rates are in controversy it would seem to be necessary to find a basis for a division of the total value of the property in-

dependently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common."

Finally, a finding of total capital or a division of capital is unnecessary in the case at bar because all the evidence proves by comparison of expenses with earnings that there is practically no return upon capital irrespective of amount invested.

In the appendix, No. 1, of this brief we have printed for the convenience of the court a summary with page references to the record of the evidence for both sides which proves confiscation as to intrastate passenger business.

“(b) Does the Railroad Company Properly Show the Earnings and Expenses Derived from and Chargeable to Its Intrastate Passenger Business?”

This branch of the Attorney General's argument opens with the assertion that to West Virginia in determining confiscation should be credited that part of the *interstate* passenger revenue which was earned by such portions of interstate passenger hauls as were made in West Virginia. In *Smyth vs. Ames*, 169 U. S., 466, this Court decided that reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons or property wholly within its limits must be determined without reference to the *interstate* business done by the carrier.

On page 6 of the Attorney General's brief the method of distributing expenses in and out of West Virginia by mileage where a division crosses the state line is criticized. Hypothetical cases not in evidence are suggested wherein such a method might conceivably be unfair either to West Virginia or to the part of the division outside that State. There is no evidence to show that the distribution of expenses described by the witnesses in the record were un-

fair for these exceptional reasons. On the contrary, the uncontradicted testimony is that the divisions were substantially the same in character, the expenses of which have been distributed on a mileage basis inside and outside the State.

At pages 7 to 9, inclusive, of the Attorney General's brief, criticism is offered of the distribution as between intrastate passenger business and other classes of business of certain items of expense. Greater accuracy at page 10 is claimed for Mr. Hillman's method as "based on actual percentages, conditions, and a thorough analysis of the expenses under consideration."

In Point (a) of I we have shown that in this case confiscation (if segregation of the intrastate passenger business from the other business of the Company is correct) is proven and admitted.

II

"Should the Railroad Company be Allowed to Segregate Its Intra Passenger Earnings from All Other Earnings in the State in Its Attempt to Show Confiscation?"

The brief of the Attorney General under this head opens with the suggestion that all intrastate rates, freight and passenger, are regulated by law in West Virginia. His suggestion

is that the Two Cent Rate Act, which was a separate act of the legislature, is but a part of a general regulation of all rates by statute.

The history of maximum rate legislation in West Virginia is this:

By an act passed 27 December, 1873 (Acts of West Virginia 1872-3, page 710) maximum freight and passenger rates were fixed. By an act passed 16 February, 1895 (Acts of West Virginia 1895, page 32) maximum freight rates were fixed, thereby, by implication, repealing the act of 1873 *as to maximum freight rates*. By an act passed 20 February, 1907, (Acts of West Virginia 1907, page 226) the Legislature fixed for all railroads over fifty miles in length a maximum passenger rate of two cents per mile, and thereby repealed by implication the provisions of the act of 1873 *as to passenger rates*.

The Attorney General points out that the Supreme Court of West Virginia in *Coal & Coke Ry. Co. vs. Conley*, 67 W. Va. at page 174, found that the Two Cent Passenger Rate Act of 1907 was "an amendment by implication, repealing existing laws so far, and only so far, as it is inconsistent therewith"; and was "an amendment of the other statutes relating to the subject matters thereof in existence at the date of its passage." Thereupon the Attorney General, partly on the authority of the Minnesota Rate Cases, urges that

the Two Cent Rate Act "should not be segregated, but considered as a part of and in the light of the entire state legislation regulating passenger and freight rates."

Let us first examine the assertion that this Court declined to allow segregation in the Minnesota Rate Cases, *supra*. From the opinion of Mr. Justice Hughes in those cases the Attorney General quotes (230 U. S. at page 466) a passage wherein this Court declined to express any opinion with respect to the method adopted in dividing expenses between the passenger and freight departments, and stated that "for the purpose of determining whether the rates permit a fair return, the results of the entire intra-state business must be taken into account." The case before the court was to restrain the enforcement of two orders of the Railroad and Warehouse Commission fixing maximum freight rates, and two acts of the Legislature prescribing maximum charges for the transportation of freight and passengers. One of the acts was a two cent maximum passenger rate act. But the railroads did not have their accounts in such condition as to distribute the expenses with reasonable accuracy as between the passenger and the freight business. Moreover, the separation of expenses by the system of accounting of those particular railroads into interstate and intrastate

had not been made. Only theories or estimates not based on actual accounts were presented to the court, and for this reason the court only considered those general results from the whole business intrastate which were shown by actual figures. That segregation, where practicable, is not condemned but is essential will appear from this extract from the opinion of Mr. Justice Hughes at page 467:

“We are of opinion that, on an issue of this character, involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost as there may be, of intrastate business, may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared, at least during test periods, properly selected. It may be said that this would have been a very difficult matter, but the company, having assailed the constitutionality of the state acts and orders, was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in

its power to present accurate *data* which would permit the court to draw the right conclusion.

As the railroads had, in the language of Mr. Justice Hughes, "assailed the constitutionality of the state acts and orders" the railroads were held bound to establish their case by evidence, and the evidence in that case was found to consist of artificial estimates based on the judgment of the witnesses instead of upon accurate data such as would permit the court to draw the right conclusion. In the case at bar the proofs were definite.

The fact is that the railroads in the Minnesota Rate Cases assailed the whole rate making scheme, and that there was no segregation as between intrastate passenger and intrastate freight business.

The argument of the Attorney General in the present case that if the business, freight and passenger, of this company, intrastate, shows a reasonable return, that then, necessarily, both branches of that business must make a reasonable return, is an argument which this Court has rejected. In the Minnesota Rate Cases this Court (230 U. S. at page 435) declined to accept the theory advanced by the State of Minnesota, that the interstate and intrastate earnings in Minne-

sota should be considered in determining confiscation, and said:

“The reason * * * is that the state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business.”

So here, the state cannot justify the confiscation of property devoted to the intrastate passenger service merely because some other branch of the company's business, state or interstate, is reasonably profitable.

The ruinous effect *pro tanto* of such confiscatory rate legislation can only result in depriving the railroad of its just revenue from other presumably reasonable rates.

Perhaps it ought to be noted that a reasonable return is not a fixed figure, but varies from the point of confiscation up to the maximum reasonable return. Confiscatory intrastate passenger rates cannot be justified by taking away the company's revenues from some other source.

Not only should segregation be allowed, but it will be required as a condition of relief. Relief in the notable Alabama Cases was denied to the carrier because of a failure to segregate the intrastate passenger earnings and cost: *L. & N. R. Co. vs. Railroad Commission of Alabama*, 208 Fed. 35. In

those cases on motion for preliminary injunction the opinions of the Judges held in substance that segregation of the intrastate passenger business must be made and that the whole of the intrastate business, freight and passenger, could not be considered in order to determine whether the maximum passenger rate of $2\frac{1}{2}$ cents per mile prescribed by the Commission was confiscatory. At page 41 the Court said:

“The plaintiff cannot be permitted to cause the failure of return by its own acts and then complain of it. For the encouragement of the manufacture of iron and its products in the Birmingham district, the plaintiff carries coal, ore, and limestone at cost, or at a loss, so far as intrastate traffic is concerned. This traffic carried without profit constitutes more than 75 per cent. of all the plaintiff's intrastate tons in Alabama. Eighty per cent. of the plaintiff's mileage in Alabama consists of branch lines, constructed, it is shown, with knowledge that they would not pay from intrastate business a fair return upon their value.”

See also the case heard at the same time by the same Judges of *S. & N. A. R. Co. vs. Railroad Commission of Alabama*, 210 Fed. 465.

The Attorney General cites cases such as *Atlantic Coast Line Railroad Company vs. North Caro-*

lina, 206 U. S., 1, for the point that a railroad company may be required to maintain a particular service (in that case a daily passenger train) at a loss. Cases of this class have no bearing on the question of segregation. They were cases where the question was not one of rates but one of the performance by the carrier of a public duty. It has long been established that a carrier must perform its public duty even though at a loss.

Another class of cases cited by the Attorney General is such cases as Minneapolis and St. Louis R. Co. *vs.* Minnesota, 186 U. S., 237. The carrier attempted to show that a particular coal rate regulated by the State of Minnesota was too low. The proofs went no further than to show that the same rate on a tonnage basis applied to the whole business of the Company would have rendered that business unprofitable. These proofs were held insufficient to entitle the carrier to relief because "it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried," and also because it is not "beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business and that the burden is upon them to impeach the action of the commission in this particular." The carrier failed in

its attack upon this coal rate because of the failure of its proof that the particular coal rate so fixed was confiscatory.

At page 23 of his brief of argument the Attorney General makes this argument:—

“If its intra passenger business is not remunerative, it follows that its freight business is more than remunerative, and it is charging unjust and unreasonable rates for its freight. In one branch it claims injustice, while in the other branch it is admittedly perpetrating that same injustice, and appeals to a court of equity.”

This argument is founded upon an error which this Court had occasion to expose in *M. & St. L. R. Co. vs. Minnesota*, 186 U. S. 257, pointing out that “it by no means follows that the companies are entitled to earn the same percentage of profit upon all classes of freight carried,” etc. It is perhaps not improper to add, in response to the suggestion that on some of its business the Company must be earning a greater rate than a reasonable one, the statement as to the carrier here seeking relief, the Norfolk and Western Railway Company, of the duly constituted federal tribunal, the Interstate Commerce Commission in the Lake Cargo Coal Rate Case, 22 I. C. C. Rep.,

604 (decided March 11th, 1912), at page 625, in authorizing an advance of the lake coal rate:—

“A further consideration which moves us to permit these advanced rates is that we regard it as unfair to take from the carrier whatever of profit it may secure by reason of improvement in its plant and adoption of the most modern methods. If our railroad systems are to remain in private hands, stimulus must be given to the initiative and imagination of railroad operators. The community may not take with justice whatever comes by the labor or time-saving devices adopted by those who serve the public, nor may the carriers absorb the profits of the shipper resulting from similar effort. This road is one of the most prosperous in the country, and it is largely so because of the enterprise of its officials in developing a great business and in handling it in the most economical method.”

At page 21 of his brief of argument the Attorney General asserts that the Norfolk and Western “should not be allowed to separate its intra passenger business from the great bulk of its operations.” This is the State’s case in final analysis.

If segregation is permitted, as it must be under the authorities and upon principle, confiscation is established without controversy by all the proofs in the case at bar.

JOSEPH I. DORAN,
THEODORE W. REATH,
JOHN H. HOLT,
LUCIAN H. COCKE,
*Of Counsel for Norfolk and Western
Railway Company.*

OCTOBER, 1914.

APPENDIX No. 1.**SUMMARY OF THE EVIDENCE FOR BOTH SIDES AS TO THE COST OF DOING INTRASTATE PASSENGER BUSINESS IN WEST VIRGINIA.****EVIDENCE OF MR. COXE, THE COMPTROLLER OF THE NORFOLK AND WESTERN RAILWAY COMPANY:**

The Norfolk and Western Railway Company since its organization in 1896 has maintained a system of accounting in this respect differing from the great majority of the roads, whereby it separates the costs expended in conducting its passenger and freight business. As the result of the experience of these years, it has ascertained that about 65% of such expenditures can be allocated and are allocated in its daily accounting. The residue or unallocated expenses are distributed, in the final summary, between passenger and freight, on the basis of engine miles.

The result of this accounting for the year ended June 30, 1909, is shown in J. W. C. Exhibit D-2, page 121 of the Record:

Operating Revenues including By-Products, (Mail, Express and Excess Baggage).....	\$355,505.10
Add Miscellaneous Income.	1,345.91
	<hr/>
	356,851.01
Operating Expenses, excluding Taxes.	345,053.25
Operating Ratio, excluding Taxes.	96.70%
Adding Ratio represented by Taxes:	\$ 12,413.87
	<hr/>
	\$356,851.01
	<hr/>
Operating Cost including Taxes,.....	100.18%

This exhibit also shows the cost per passenger per mile to be 2.365 cents, which is obtained by dividing the intrastate passengers one mile into the operating expenses for that year.

Operating Expenses (excluding Taxes . . .	\$345,053.52
	<hr/>
Passengers One Mile . . .	14,592,621
	= 2.365 Cents

EVIDENCE OF MR. HILLMAN FOR THE STATE.

The unallocated items of expense, about 35%, were divided by Mr. Hillman on the basis of use-

units. He took up each one of the 116 accounts of the company which were kept as prescribed by the Interstate Commerce Commission, and divided each item of expense between the passenger and freight business of the Railway Company according to the use by each department of the particular items of expenditure. This he did in detail.

The final result of his analysis of the cost of doing the intrastate passenger business in West Virginia appears in his exhibits (between pages 244 and 245 of the record), the final summary of which is found in Exhibit No. 6, as follows:—

Operating Ratio, excluding Taxes, on Intra-State Passenger Business in- cluding By-Products (Mail, Express and Excess Baggage).....	93.3754%
Adding Ratio represented by taxes,....	4.0449%
<hr/>	
Operating Cost including Taxes,	97.4203%

His conclusion, accordingly, was that practically the whole revenue from intrastate passenger business of the Norfolk and Western Railway Company in West Virginia was absorbed by the cost of doing that business. (See for his conclusion the testimony of Mr. Hillman, Record page 213).

APPENDIX No. 2.

**LEGISLATION OF WEST VIRGINIA AS TO
ASSESSMENT OF RAILROADS. HOGG'S
WEST VIRGINIA CODE ANNOTATED,
VOLUME 1, CH. 29, SECTIONS 968 AND
969 (PAGES 404-405).**

**Sec. 968. Public Service Corporations—Re-
turns of Property to Board of Public Works.**

84. On or before the first day of April in each year a return in writing to the board of public works shall be delivered to the state tax commissioner by the owner or operator of every railroad, wholly or in part within this state; by the owner or operator of every railroad bridge upon which a separate toll or fare is charged; by the owner or operator of every car or line of cars used upon any railroad within the state for transportation or accommodation of freight or passengers, other than such owners or operators as may own or operate a railroad within the state; by the owner or operator of every express company or express line, wholly or in part within this state, used for the transportation by steam or otherwise of freight and other articles of commerce; by the owner or

operator of every pipe line, wholly or in part within this state, used for the transportation of oil or gas or water, whether such oil or gas or water be owned by such owner or operator or not, or for the transmission of electrical or other power, or the transmission of steam or heat and power or of articles by pneumatic or other power; and by the owner or operator of every telegraph or telephone line, wholly or in part within this state, except private lines not operated for compensation. The words "owner or operator" as applied herein to railroad companies shall include every railroad company incorporated by or under the laws of this state for the purpose of constructing and operating a railroad, or of operating part of a railroad within this state, whether such railroad or any part of it be in operation or not; and shall also include every other railroad company, or persons or associations of persons, owning or operating a railroad or part of a railroad in this state on which freight or passengers, or both, are carried for compensation. The word "railroad," as used herein includes every street, city, suburban or electric or other railroad, or railway. The word "owner or operator," as applied herein to express companies shall include every express company incorporated by or under the laws of this state, or doing business in this state, whether incorporated or not, and any per-

son or associations of persons, owning or operating any express company or express line upon any railroad or otherwise, doing business partly or wholly within this state. Such return shall be signed and sworn to by such owner or operator if a natural person, or, if such owner or operator shall be a corporation, shall be signed and sworn to by its president, vice-president, secretary or principal accounting officer, and shall show in detail particulars as hereinafter set forth, for the year ending on the thirty-first of December next preceding.

Sec. 969. Same—Railroads—Returns—Contents.

85. In the case of a railroad, such return shall show for every such owner or operator;

(a) The whole number of miles of railroad owned, leased or operated within this state.

(b) If such railroad be partly within and partly without this state, the whole number of miles within this state, and the whole number of miles without the same, including its branches in and out of the state;

(c) The railroad track in each county in this state through which it runs; giving the whole number of miles of road in the county, including the track and its branches and side and second

tracks, switches and turnouts therein, and the true and actual value per mile of such railroad in each county, stating the valuation of main track, second main track, branches, sidings, switches and turnouts separately;

(d) All rolling stock owned, leased or operated, showing in separate classes: (1) The rolling stock owned; (2) the rolling stock leased or held under any conditional sale or other contract, giving such owner or operator the possession or control thereof; (3) the rolling stock used upon the line of such owner or operator, but owned by other railroad companies not owning or operating a railroad wholly or in part within this state; and (4) the rolling stock used upon such line, but owned, held or operated by corporations or companies not railroad companies, or by individuals, and for each of said classes giving a detailed statement of the number and ownership of engines, car lines and cars, including passenger, mail, express, baggage, freight, sleeping, dining, parlor, refrigerator, stock and other cars of every description, and the names and addresses of the owners, and the true and actual value of all such cars used wholly or in part in this state, distinguishing between those used wholly in this state and those used partly within and partly without the state; the whole number of engines, including their appendages, used wholly or in part within

this state, distinguishing between those used wholly within this state and those used partly within and partly without the same, and the true and actual value of those used wholly within the state and those used partly within and partly without the state; and the proportional value of cars and engines used partly within and partly without the state, according to the time used and the number of miles run by such cars and engines in and out of the state; and the proportional value thereof in each county in this state within which such railroad runs;

(e) the depots, station houses, section houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, including tool houses and the tools usually kept therein, together with all other real estate, other than railroad track, owned or used in connection with the railroad, and not otherwise taxed, including telegraph and telephone lines owned or used, and the true and actual value of all buildings and structures, and all such machinery and appendages, and each parcel of such real estate, including such telegraph or telephone lines, and the true and actual value thereof in each county in this state in which it is located;

(f) personal property, of every kind whatsoever, including money, credits and investments

wholly held or used in this state, showing the amount and value thereof in each county;

(g) an itemized list of all other real property, with the location thereof, which list shall show as to each parcel whether it is assessed for taxation, and if so, by what officer or authority;

(h) the capital actually employed; the total amount of bonded indebtedness, and of indebtedness not bonded; gross earnings for the year, including earnings from telegraph lines, which shall be stated separately, on the whole length of road, including the branches thereof, in and out of the state, and also such earnings within the state on way freight and passengers, and the proportion of such earnings in this state on through freight and passengers carried over lines in and out of the state, to be ascertained by the number of miles the same was carried within and the number of miles without the state; and, if such owner or operator be a corporation, its actual capital stock, and the number, character, amount and market value of the shares thereof, and the amount of capital stock actually paid in;

(i) gross expenditures for the year, giving a detailed statement thereof under each class or head of expenditures.

NORFOLK AND WESTERN RAILWAY COMPANY
v. CONLEY, ATTORNEY GENERAL OF THE
STATE OF WEST VIRGINIA.

ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE
OF WEST VIRGINIA.

No. 197. Argued October 13, 1914.—Decided March 8, 1915.

Northern Pacific Ry. v. North Dakota, ante, p. 585, followed to effect that while the State has a broad field for the exercise of its power in fixing intrastate rates for common carriers it may not require them to transport a segregated commodity or class of traffic either at less than cost or for a mere nominal consideration.

This court must on writ of error under § 237, Jud. Code, analyze the facts as found by the state court if it is necessary to do so in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law involving the Federal right asserted as to be in substance a decision of the latter.

An analysis of the evidence in this case shows that the two cent a mile passenger rate established by ch. 41 of the acts of 1907 of West Virginia affords such a narrow, if any, margin over the cost of the traffic that the plaintiff in error is forced to carry passengers, if not at or below cost, with merely a nominal reward, and it follows that the State exceeded its power in enacting the same and that it is void as an attempt to deprive the carriers of their property without due process of law in violation of the Fourteenth Amendment.

THE facts, which involve the constitutionality under the due process provision of the Fourteenth Amendment of a statute of West Virginia fixing the maximum fare for

passengers on railways at two cents a mile, are stated in the opinion.

Mr. John H. Holt and Mr. Lucien H. Cocke, with whom Mr. Joseph I. Doran and Mr. Theodore W. Reath were on the brief, for plaintiff in error:

The earnings from intrastate passenger business must be separated from all other earnings to determine whether the act is confiscatory.

Chapter 41, Act of 1907, regulating passenger rates upon railroads in the State of West Virginia, and prescribing penalties for the violation thereof is unconstitutional. *Ches. & Ohio Ry. v. Conley*, 230 U. S. 513; *Coal Ry. v. Conley*, 67 W. Va. 129; *Consolidated Gas Case*, 212 U. S. 19; *Five Per Cent Case*, 31 I. C. C. 351, 407; *Int. Com. Comm. v. Un. Pac. R. R.*, 222 U. S. 541; *Knoxville v. Water Co.*, 212 U. S. 1; *Prentiss v. Atlantic Coast Line*, 211 U. S. 210; *Railroad Co. v. Philadelphia*, 220 Pa. St. 100; *Smyth v. Ames*, 169 U. S. 466; *Southern Ry. v. St. Louis Hay Co.*, 214 U. S. 297.

The railroad properly shows the capital invested in its intrastate passenger service used and useful in that service.

The railroad company properly shows the earnings and expenses derived from and chargeable to its intrastate passenger business.

The railroad company should be allowed to segregate its intra-passenger earnings from all other earnings in the State in its attempt to show confiscation. *Atl. Coast Line v. North Carolina*, 206 U. S. 1; *Coal Ry. v. Conley*, 67 W. Va. 174; *Lake Cargo Coal Rate Case*, 22 I. C. C. 604; *Louis. & Nash. R. R. v. Alabama*, 208 Fed. Rep. 35; *Minnesota Rate Cases*, 230 U. S. 352; *Missouri Rate Cases*, 230 U. S. 474; *M. & St. L. R. v. Minnesota*, 186 U. S. 257; *Smyth v. Ames*, 169 U. S. 466; *S. & N. A. R. R. v. Alabama*, 210 Fed. Rep. 465.

236 U. S.

Opinion of the Court.

Mr. A. A. Lilly, Attorney General of the State of West Virginia, for defendants in error:

The carrier does not properly show the capital invested in its intrastate passenger service used and useful therein. The valuation proved is improper for a rate basis. *People v. New York*, 199 U. S. 1; *San Francisco v. Dodge*, 197 U. S. 70; *Missouri Rate Case*, 230 U. S. 474; *Allen v. St. Louis &c. Ry.*, 230 U. S. 552; *Chi., M. & St. P. R. R. v. Tompkins*, 176 U. S. 167; nor does it properly show intrastate earnings and expenses.

The carrier cannot segregate its intrastate passenger earnings from all other intrastate earnings in order to show confiscation. *Norfolk & West. Ry. v. Pinacle Coal Co.*, 44 W. Va. 574; *Railway Co. v. Conley*, 67 W. Va. 174; *Railway Co. v. United States*, 99 U. S. 402.

If the State allows the carrier to earn suitable return for its whole intrastate business it may require some commodities to be carried at a loss. *St. Louis &c. Co. v. Gill*, 156 U. S. 649; *Minnesota Rate Case*, 230 U. S. 352; *Minn. &c. Ry. v. Minnesota*, 186 U. S. 257; *Willcox v. Consol. Gas Co.*, 212 U. S. 19; *Atl. Coast Line v. Nor. Car. Corp. Comm.*, 206 U. S. 1; *Pens. & Atl. Ry. v. Florida*, 3 L. R. A. 661; *Penna. R. R. v. Philadelphia*, 220 Pa. St. 122.

A rate of 6% per annum is reasonable, *Covington &c. Co. v. Sanford*, 164 U. S. 578, but even if smaller, if any, the carrier cannot complain.

MR. JUSTICE HUGHES delivered the opinion of the court.

In 1907, the legislature of West Virginia passed an act fixing the maximum fare for passengers on railroads, as described in the statute, at two cents a mile. Acts, 1907, Ch. 41, p. 226. After the rate had been tested by operating under it for two years, the plaintiff in error brought this suit to restrain its enforcement as being in violation of the

constitution of the State, and also upon the ground that it was repugnant to the Fourteenth Amendment by reason of (1) its provision for penalties, (2) its classification of railroads, and (3) its alleged confiscatory requirements, through the reduction of the revenue from the traffic to less than a reasonable compensation. The validity of the statute, as construed by the state court, with respect to penalties and classification was upheld in *Chesapeake & Ohio Ry. v. Conley*, 230 U. S. 513. In the case of *Coal & Coke Ry. v. Conley*, 67 W. Va. 129, while the statute was sustained against the other objections above mentioned, it was adjudged to be confiscatory in its operation with respect to the plaintiff in that case. In the present suit the Circuit Court of Kanawha County by its decree entered in March, 1913, held that the rate was not confiscatory in fact as to the plaintiff in error. No opinion appears in the record and there were no special findings. An application was made to the Supreme Court of Appeals of West Virginia for the allowance of an appeal to that court, and it was refused. This writ of error was then sued out.

1. The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered. What has been said in the opinion in *Northern Pacific Railway v. North Dakota*, decided this day (*ante*, p. 585), makes an extended discussion of this question unnecessary. It was recognized that the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the State has no arbitrary power over rates; that the devotion of the property of

the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the State may not select a commodity, or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal.

These considerations are controlling here. The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organization and management, and of necessity its own rates. In making a reasonable adjustment of the carrier's charges, the State is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the State may not select either of these departments for arbitrary control. Thus, it would not be contended that the State might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the State should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost. That fact, satisfactorily proved, would be sufficient to rebut the presumption of reasonableness; and if in any case it could be said that there existed other criteria by reference to which the rate could still be supported as a reasonable one for the transportation in question, it would be necessary to cause this to appear. *Northern Pacific Railway v. North Dakota*, *supra*, and cases there cited.

2. So far as findings are concerned, we have in the present case simply a general, or ultimate, conclusion of

fact which is set forth in the decree of the state court; and it is necessary for us, in passing upon the Federal right which the plaintiff in error asserted, to analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter. *Kansas City Southern Ry. v. Albers Commission Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669; *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 528; *Creswill v. Knights of Pythias*, 225 U. S. 246, 261; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611; *Wood v. Chesborough*, 228 U. S. 672, 678.

3. The passenger rate in question went into effect in May, 1907, and was observed by the company until about September, 1909, when under the terms of the interlocutory injunction in this suit the charge was increased to two and one-half cents a mile. There were, therefore, two fiscal years, June 30, 1907, to June 30, 1909, during which the company operated its road in West Virginia under the statutory rate. Evidence was introduced on behalf of the company showing the results according to its calculations. It was testified that the intrastate passenger receipts had been carefully ascertained. With respect to the operating expenses, it was said that for many years accounts had been kept for the purpose of separating the expenses incident to the freight and passenger traffic, respectively; that about 65 per cent. of these expenses could be directly assigned, and that the remaining 35 per cent., consisting of items common to both sorts of transportation, were divided between the passenger and freight traffic on the basis of engine miles,—this being deemed to be more equitable than the train-mile basis originally used, inasmuch as most of the freight was hauled by two engines. In practice, this method was assumed—in accordance with an early computation—to mean that 20 per cent. of such items should be assigned to the passenger

traffic; this, it was insisted, was a close approximation. Where a division of the road was partly in one State and partly in another the passenger expenses were apportioned according to track mileage. These expenses within the State having thus been ascertained, they were divided between the interstate and intrastate traffic upon the basis of the gross passenger earnings; that is, it was assumed that the cost of the interstate and intrastate passenger traffic was the same in relation to revenue. It was also testified that betterments were not included in expenses, and that the above-mentioned apportionment covered all the operating expenses, except taxes, the latter being apportioned to each class of business according to its share of the gross receipts.

It was stated that the intrastate passenger receipts which had been \$362,997.74 in the fiscal year 1906-7¹ had fallen, notwithstanding a considerable increase in the number of passengers and passenger mileage, to \$289,943.22 in the fiscal year 1907-8. The passenger expenses for the latter year, estimated according to the method above set forth, together with taxes, amounted to \$275,519.79, leaving a net surplus of \$14,423.43. In the following fiscal year, 1908-9, the intrastate passenger receipts were \$281,864.50. This showed a reduction of \$81,133.24, as compared with the fiscal year 1906-7, although there was a gain over that year of 1,567,374 in the passenger mileage. The expenses attributed by the company to the intrastate passenger traffic, including taxes, for the year 1908-9, amounted to \$283,416.62, thus leaving a deficit in the passenger operations of \$1,552.12.

In the receipts, as thus stated, there was omitted the revenue derived from the mail, express, news privileges and other items of passenger train earnings. Including this miscellaneous income, it appeared from the company's

¹ Approximately eleven months of the fiscal year 1906-7 were under the former maximum fare of three cents a mile.

statement that the net return of the intrastate passenger business for the year 1907-8 was \$18,354.62; in the year 1908-9, the inclusion of these items still left a deficit amounting to \$616.11.

Criticizing the methods of apportionment adopted by the company, the State presented on its part elaborate calculations for the purpose of showing the effect of the rate. These calculations were based upon a painstaking analysis made by the State's expert accountant of the receipts and expenses disclosed by the company's records and accounts. For this critical study there were selected the months of November, 1909, and May, 1910, which the State's witness testified were typical with respect to the passenger business of the fiscal year ending June 30, 1910. The examination was made of the traffic on the Pocahontas and Kenova divisions of the road, which contained over 90 per cent. of the total track mileage of the company in West Virginia, and the passenger traffic on which—according to passenger mileage—was stated to be over 97 per cent. of the whole. The testimony was that the results of the analysis of the traffic on these divisions could be deemed to be fairly representative of the entire passenger business. The receipts of the intrastate traffic were adjusted to the two cent fare basis; that is, according to the statutory rate as applied to the actual travel over the road. The State suggests that neither in its own calculations nor in those of the company was any account taken of the receipts from interstate passengers in West Virginia, but these were properly excluded. *Smyth v. Ames*, 169 U. S. 466, 541. The company had kept on its books separate accounts of the expenses of the freight and passenger business on the divisions above-mentioned, but the State's expert did not accept the company's distribution. For example, on the Pocahontas division, the books showed passenger expenses in November, 1909, amounting to \$48,895.22; the witness for the State by his computa-

tions made these expenses \$37,100.72. On the same division in May, 1910, the company's figures for passenger expenses were \$51,885.72; the State's, \$40,643.36. There were also similar reductions of considerable amounts on the Kenova division. It is not necessary to review in detail the methods thus used on the part of the State to apportion the various common items of expense,—that is, after all items capable of direct assignment had been charged to the business to which they related. It is sufficient to say that instead of employing a general factor for the distribution of the outlays common to both kinds of traffic, freight and passenger, the State's witness divided each particular common item according to its character so as to make what was deemed to be a fair apportionment of that item. In this way, a variety of methods were employed which the witness described at length. After ascertaining the amount of the total expense considered to be attributable to the passenger traffic within the State, it was divided between the intrastate and interstate business; and for the most part—aside from the expenses of passenger stations—the division was made on the basis of passenger miles and without charging extra cost to the intrastate traffic.

By combining the results of the selected periods, it was shown that in the intrastate passenger business, according to the classification and apportionment adopted, the operating expenses and taxes consumed 97.4203 per cent. of the total income.

This, in brief, was the result of the elaborate analysis presented by the State. There is no reason to suppose that either the periods chosen or the methods used were unfavorable to the rate. Included in the passenger business were the items of mail, express, excess baggage, etc.; the State did not present calculations as to the net return upon these items separately considered. When the State's expert who testified that he had undertaken to

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separate the cost of the express business, was asked on cross-examination whether with these items omitted the actual cost of carrying intrastate passengers was not in excess of two cents a mile, he said that it would be difficult to answer without a separate analysis of the mail item, but added that 'in rough computation' that cost was very close to two cents.

It is apparent, from every point of view that this record permits, that the statutory rate at most affords a very narrow margin over the cost of the traffic. It is manifestly not a case where substantial compensation is permitted and where we are asked to enter the domain of the legislative discretion; nor is it one in which it is necessary to determine the value of the property employed in the intrastate business. It is clear that by the reduction in rates the company is forced to carry passengers, if not at or below cost, with merely a nominal reward considering the volume of the traffic affected. We find no basis whatever upon which the rate can be supported and it must be concluded in the light of the principles governing the regulation of rates that the State exceeded its power in imposing it.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE PITNEY dissents.